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RECORD, CASE No. 13,699.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 125.

DAVID LEHNEN, PLAINTIFF IN ERROR,

vs.

NEWTON DICKSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 5, 1889.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1888, thereof, between Newton Dickson, plaintiff, and David Lehnen, defendant, a manifest error hath happened, to the great damage of the said defendant David Lehnen, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, dated as aforesaid.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

A. P. SELBY,
Clerk Circuit Court United States, Eastern Division of the Eastern Judicial District of Missouri.

Allowed by—
AMOS M. THAYER, *Judge.*

1½ [Endorsed:] No. 2683. United States circuit court, eastern division of the eastern judicial district of Missouri. Newton Dickson *vs.* David Lehnen. Writ of error to the circuit court of the United States, eastern division, eastern judicial district of Missouri. Returned and filed 14th day of March, 1889. A. P. Selby, clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified

transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this first day of June, A. D. 1889.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

A. P. SELBY,
Clerk of said Court.

2 UNITED STATES OF AMERICA:

To Newton Dickson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, wherein David Lehnen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the circuit court of the United States for the eastern district of Missouri, this 14th day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

AMOS M. THAYER,
Judge United States District Court, Eastern District of Missouri.

Service of the above citation accepted this 14th day of March, 1889.

NEWTON DICKSON,
By J. O. BROADHEAD, *Att'y.*

2½ [Endorsed:] 2683. United States circuit court, eastern division of the eastern judicial district of Missouri. Newton Dickson *vs.* David Lehnen. Citation. Filed March 14, 1889. A. P. Selby, clerk.

3 UNITED STATES OF AMERICA, *Eastern Division of the Eastern Judicial District of Missouri,* } *ss:*

In the Circuit Court of the United States in and for said Division of said Judicial District.

Be it remembered that on the twenty-ninth day of July, A. D. 1886, the following, among other, proceedings were had and appear of record in the circuit court of the United States in and for the eastern district of Missouri, to wit:

Transcript Filed.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

Now comes the defendant, by Barker and Shackelford, his attorneys, and files transcript of the record herein from the circuit court of Montgomery county, Missouri, and enters appearance herein to the September term, 1886, of this court.

4 Said transcript is in words and figures following, to wit:

Transcript.

STATE OF MISSOURI,
County of Montgomery, } *ss:*

Pleas and proceedings had before the circuit court of Montgomery county, Missouri, at a term begun and held at the court-house, in the town of Danville, county and State aforesaid, on the 26th day of April, A. D. 1886, before Honorable Elijah Robinson, judge of the third judicial circuit of the State of Missouri and judge of the circuit court of said Montgomery county.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

Be it remembered that heretofore, to wit, on the 8th day of March, A. D. 1886, there was filed in the office of the clerk of the circuit court of the county of Montgomery and State of Missouri a certified copy of the plaintiff's complaint in the above-entitled cause, and also attached thereto the affidavit of E. M. Hughes, Esq., one of the attorneys for plaintiff in said cause, and also an indemnifying bond.

5 Which said copy of complaint is in words and figures as follows, to wit:

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.
} Petition.

Complaint in action of unlawful detainer, before Nelson Fike, justice of the peace, Upper Loutre township, Montgomery county, Missouri.

The plaintiff, Newton Dickson, states that the defendant, David Lehnen, unlawfully detains from the plaintiff the following-described tracts of land situate and located in the county of Montgomery, in the State of Missouri, to wit, the southwest fourth of the northwest quarter, and the north half of the southeast quarter, and the south half of the northeast quarter, and the northeast fourth of

the southwest quarter, and the southeast fourth of the northwest quarter, and the northwest fourth of the northeast quarter, and the north half of the northwest quarter in section No. 9, in township No. 50, of range No. 6 west; also the south half of the northeast quarter, and the north half of the southeast quarter, and the
6 north half of the northeast quarter in section No. 8, in township No. 50, of range No. 6 west.

That the defendant wrongfully and unlawfully detains the said lands from the plaintiff and has so done since the second day of January, 1886.

NEWTON DICKSON,
By his attorneys, SOL. HUGHLETT AND E. M. HUGHES.

STATE OF MISSOURI, } *ss:*
County of Montgomery, }

Sol. Hughlett, one of the attorneys for the above-named plaintiff, Newton Dickson, being duly sworn, on his oath says that the facts stated in the above complaint are true and correct.

(Signed) SOL. HUGHLETT.

Subscribed and sworn to before me, a justice of the peace within and for said county and State, this 5th day of February, 1886.

NELSON FIKE,
Justice of the Peace, Montgomery County, Missouri.

Endorsed: "Filed February 6th, 1886. Nelson Fike, J. P.;" also "filed M'ch 8th, 1886. A. B. Hunter, clerk."

Affidavit on Application for Writ of Certiorari.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

7 Action of unlawful detainer now pending before Nelson Fike, J. P., Montgomery county, Missouri.

E. M. Hughes, on behalf of the complainant in the above-entitled cause, being duly sworn, on his oath states that he verily believes that the complainant in this cause is justly entitled to recover the possession of the premises described in the complaint in this cause, a copy of which is hereto attached.

(Signed) E. M. HUGHES.

Subscribed and sworn to before me, clerk of the circuit court of Montgomery county, Missouri, this 8th day of March, 1886.

A. B. HUNTER,
Clerk Circuit Court.

Endorsed: "Filed M'ch 8th, 1886. A. B. Hunter, clerk."

Bond.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

Action of unlawful detainer pending before Nelson Fike, J. P.

We, Sol. Hughlett, as principal, and E. M. Hughes, as security, acknowledge ourselves to owe and stand indebted unto David Lehnen, the above-named defendant, in the sum of one hundred dollars; for the true and faithful payment of which we bind
8 ourselves, our heirs, executors, and administrators, firmly by these presents.

The condition of the above bond is that if the above-named complainant, Newton Dickson, shall prosecute his suit as above entitled with effect and without delay pay all costs that may be adjudged against him, and otherwise abide the judgment of the circuit court of said county, then this bond to be void; otherwise to remain in full force and effect.

Witness our hands and seals this 8th day of March, 1886.

SOL. HUGHLETT. [SEAL.]
E. M. HUGHES. [SEAL.]

Approved by the clerk of the circuit court of Montgomery county, Missouri, this 8th day of March, 1886.

A. B. HUNTER,
Clerk Circuit Court.

And thereupon there was issued by the clerk of the circuit court of Montgomery county, Missouri, aforesaid, a writ of certiorari, directed to said Justice Nelson Fike; which said writ is in words and figures as follows, to wit:

Writ of Certiorari.

NEWTON DICKSON, Complainant,
vs.
DAVID LEHNEN, Defendant.

9 Action of unlawful detainer now pending before Nelson Fike, J. P.

The State of Missouri to Nelson Fike, justice of the peace in Montgomery county, Missouri:

You are hereby commanded that you stay all further proceedings in the above-entitled cause and certify to the circuit court of Montgomery county, Missouri, a complete transcript of your docket and all proceedings had before you, together with the original papers filed in the above-entitled cause, and you are further commanded that you file the same in the office of the clerk of the circuit court

of Montgomery county, Missouri, within ten days after the service of this writ upon you.

In testimony whereof I have hereto set my hand and affixed my official seal, at office, in the town of Danville, in said county and State, this 8th day of March, 1886.

[SEAL.] A. B. HUNTER,
Circuit Court Clerk.

Sheriff's Return.

Served this writ in Montgomery county, Mo., on the 8th day of March, 1886, by delivering to the within-named Nelson Fike a true copy of the same.

(Signed) JAMES R. APPLING, *Sheriff.*

Filed M'ch 10, 1886.

10 And also on the same day and date last aforesaid the transcript of said justice's docket was filed; which said transcript is in words and figures as follows, to wit:

Transcript from Justice of the Peace.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

Before Nelson Fike, justice of the peace.

Complaint in the above cause filed in action of unlawful detainer Feb'y 6, 1886. Thereupon writ issued and delivered same to J. B. Ellicott, constable, and made returnable the 12th day of February, 1886.

NELSON FIKE, *J. P.*

Now, on this 12th day of February, 1886, the parties, being called, come into court and by consent of parties this cause is continued to 24th day of February, 1886.

NELSON FIKE, *J. P.*

Now, on this 24th day of February, 1886, the above cause coming on for trial, the parties, being called, come into court, both plaintiff and defendant, by their attorneys. At this the defendant's attorney demanded a jury. Venire issued to J. B. Ellicott, constable,
11 who returned the following names as jurymen: Jas. Mosby, George Thorp, J. B. Clarkson, John Clayton, John Smith, and Oscar Moore, who are sworn to try this cause, and take seats. At this point the evidence is introduced and canvassed *pro* and *con*. After this addresses by the attorneys. This cause is submitted to the jury, who retire to the jury-room and remain for some considerable time and return the following verdict, to wit:

"We, the jury, agree to disagree.

(Signed) JAMES MOSBY, *Foreman.*"

The above cause continued to the 11th day of March, 1886.

NELSON FIKE, *J. P.*

Now, on this 8th day of March, 1886, writ served on me, Nelson Fike, justice of the peace, by Sheriff Appling to stay all further proceedings in the above cause and make a complete transcript of all papers relating to said cause to A. B. Hunter, clerk circuit court at Danville, Montgomery Co., Mo.

Certificate of Justice of the Peace.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN.

Action on unlawful detainer before Nelson Fike, J. P.

I, Nelson Fike, a justice of the peace within and for Mont-
12 gomery county, State of Missouri, certify that the above and foregoing is a full and complete transcript of all the entries made in my docket touching said cause, and that the papers herewith sent include all filed in said cause.

Given under my hand this 9th day of March, 1886.

NELSON FIKE,
Justice of the Peace.

The State of Missouri to the constable of Upper Loutre township, in Montgomery county, Greeting:

We command you to summon David Lehnen to appear before the undersigned, one of the justices of the peace of Upper Loutre township, in Montgomery county aforesaid, on the 12th day of February, 1886, at ten o'clock in the forenoon, at my office in said township, to answer and defend against the complaint of Newton Dickson for unlawful detainer, made by the said David Lehnen upon the lands of said Newton Dickson, as by the complaint of said Newton Dickson hereto annexed will more fully appear, and have you then and there this writ with the return of your proceedings thereon and wherein he demands —— dollars.

13 Given under my hand this 6th day of February, 1886.

NELSON FIKE,
Justice of the Peace.

Constable's Return.

I hereby certify that I have executed the within writ by reading the same and the complaint hereto attached to the defendant, David Lehnen, the 6th day of February, 1886, in Upper Loutre township, Montgomery Co., Missouri.

J. B. ELLICOTT,
Constable, Upper Loutre Township.

Bond for Costs.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

And three other cases against Lehnen and others.

We bind ourselves to pay all costs that have accrued or may hereafter accrue in the above cause.

NEWTON DICKSON,
By SOL. HUGHLETT.
SOL. HUGHLETT,
For Himself.
E. M. HUGHES.

Filed Feb'y 24, 1886.

NELSON FIKE, *J. P.*

And afterwards, to wit, at the regular April term, A. D. 1886, and on the 27th day of April, 1886, of the Montgomery county circuit court, the following appears of record, to wit:

NEWTON FIKE, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

14 Defendant appears, by attorneys, and files his petition and bond for the removal of this cause to the circuit court of the United States for the eastern district of Missouri.

Which said petition for removal of this cause is in words and figures as follows, to wit:

STATE OF MISSOURI,
County of Montgomery, } *ss:*

Petition for Removal.

In the Circuit Court of Montgomery County.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

To the honorable the circuit court of Montgomery county, Mo.:

Your petitioner respectfully shows that the matter and amount involved in the above cause exceeds, exclusive of costs, the sum or value of five hundred dollars. Your petitioner further shows that the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of Missouri, and that Newton Dickson was then and still is a citizen of the State of Virginia, and that the

matter in dispute in this action exceeds largely the sum of
15 five hundred dollars in value, exclusive of costs and interest;
and your petitioner offers herewith a bond, with good and sufficient surety, in the penal sum of five hundred dollars conditioned for his entering in the circuit court of the United States for the eastern district of Missouri on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed into said circuit court of the United States within and for the eastern district of Missouri, according to the statute in such case made and provided.

And your petitioner will ever pray, etc.

DAVID LEHNEN.

JOHN M. BARKER &
BARKER & SHACKELFORD,
Attorneys for Petitioners.

STATE OF MISSOURI, }
Montgomery County. }

David Lehnen, being duly sworn, on his oath deposes and
16 says that he is the defendant and petitioner in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein stated are true as he verily believes.

(Signed) DAVID LEHNEN.

Subscribed and sworn to by said David Lehnen this 24th day of April, A. D. 1886, before me—

[SEAL.] A. JACOBUS,
Notary Public.

Bond for Removal.

Know all men by these presents that we, David Lehnen, as principal, and Daniel Lehnen, of Wellsville, in the county of Montgomery and State of Missouri, as surety, are held and firmly bound unto Newton Dickson in the penal sum of two hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves and our heirs, executors, or administrators jointly and severally and firmly by these presents.

Whereas David Lehnen, principal above named, has petitioned the circuit court of Montgomery county, in the State of Missouri,
for the removal of a certain suit therein pending, wherein
17 Newton Dickson is plaintiff and the said David Lehnen is defendant, into the circuit court of the United States for the eastern district of Missouri:

Now, therefore, the condition of this obligation is such that if the

above-bounden David Lehnen shall enter and file or cause to be entered and filed in the next circuit court of the United States in and for the eastern district of Missouri, on the first day of its next session, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the said circuit court of Montgomery county and State of Missouri, in which Newton Dickson is plaintiff and David Lehnen is defendant, and shall pay all costs that may be awarded by said circuit court if said circuit court shall hold that said cause was wrongfully or improperly removed thereto, and shall also appear in said circuit court and enter special bail in such cause if special bail was originally required therein, and shall do such other appropriate acts as by the act of Congress in that behalf required to be done upon the
18 removal of such suit from said State court into the United States court, then this obligation to be void; otherwise of force.

Witness our hands and seals this 24th day of April, 1886.

DAVID LEHNEN. [SEAL.]
DANIEL LEHNEN. [SEAL.]

STATE OF MISSOURI, } ss:
Montgomery County, }

Daniel Lehnen, being duly sworn, says that he is a resident and householder within the county of Montgomery and worth the sum of one thousand dollars over and above all debts and liabilities which he owes or has incurred and exclusive of property exempt from levy and sale under execution.

(Signed) DANIEL LEHNEN.

Sworn to before me this 24th day of April, 1886.

A. JACOBUS,
[SEAL.] *Notary Public.*

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I hereby certify that on this 24th day of April, 1886, before me came and personally appeared David Lehnen, the principal in the within bond, personally known to me and known to me to be
19 the person in and who executed the foregoing bond as principal, and that he thereupon acknowledged that he executed the same in the manner and form and for the purposes therein mentioned.

A. JACOBUS,
[SEAL.] *Notary Public.*

STATE OF MISSOURI, } ss:
Montgomery County, }

I hereby certify that on this 24th day of April, 1886, before me came and personally appeared Daniel Lehnen, to me well known and known to me to be the person in and who executed the forego-

ing bond as surety, and thereupon acknowledged to me that he executed the same in the manner and form and for the purposes therein mentioned.

[SEAL.] A. JACOBUS,
Notary Public.

And afterwards, to wit, at the regular April term, A. D. 1886, of the circuit court for the county of Montgomery and State of Missouri, and on the 3rd day of May, 1886, it being the 6th day of said term *of said term* of said court, the following, among other, proceedings were had, entered, and appear of record, to wit:

20 *Order of Removal.*

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

On defendant's petition, application, and bond for the removal of this cause to the circuit court of the United States for the eastern district of the State of Missouri.

Now, at this day, comes the defendant, David Lehnen, by his attorneys, and said defendant's petition and application and bond, heretofore filed herein, for the removal of the above-entitled — to the circuit court of the United States for the eastern district of the State of Missouri coming on to be heard—

Thereupon the said bond herein filed is by the court approved, and the matters and things in said petition contained for the removal of said cause being submitted to the court and being seen, heard, and fully understood by the court and upon the argument of counsel, it is therefore considered and ordered by the court that said application be, and the same is hereby, sustained for the reasons stated in said petition.

21 And it is therefore further considered and ordered by the court that said cause be, and the same is hereby, removed to the circuit court of the United States for the eastern district of the State of Missouri, and that the clerk of this court make out a full, true, and complete transcript of all processes, pleadings, depositions, testimony, and other proceedings had in the above-entitled cause, and duly certify and transmit — the clerk of the circuit court of the United States for the eastern district of the State of Missouri.

STATE OF MISSOURI, *County of Montgomery,* } *ss:*

I, A. B. Hunter, clerk of the circuit court in and for said county, do hereby certify that above and foregoing is a full and true and complete copy and transcript of all process, pleadings, depositions, testimony, and other proceedings had in the above-entitled cause as fully as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and
22 affixed the seal of said court. Done at office, in the town of Danville, in said county, this 18th day of June, A. D. 1886.

A. B. HUNTER,
[SEAL.] *Clerk Circuit Court.*

And afterwards, to wit, on the sixth day of October, A. D. 1886, the following, among other, proceedings were had and appear of record in the circuit court of the United States in and for the eastern district of Missouri, to wit:

Jury Waived.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

Now come the parties, by their attorneys, and in open court waive a jury herein.

And afterwards, to wit, on the 7th day of January, A. D. 1889, at a regular stated term of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, the following proceedings were had and appear of record in said cause, to wit:

Case Submitted.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

23 Now come the parties, by their respective attorneys, the plaintiff by James O. Broadhead and the defendant by D. P. Dyer, and this cause coming on to be heard the same is submitted to the court without the intervention of a jury upon the pleadings, proofs, and arguments of counsel, and by the court taken under advisement.

And afterwards, to wit, on the 30th day of January, A. D. 1889, and at said term of court, the following further proceedings were had and appear of record in said cause, to wit:

Judgment.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

Now again come the parties by their respective attorneys, the plaintiff by James O. Broadhead, Esquire, and G. B. Macfarlane,

Esquire, and the defendant by D. P. Dyer, Esquire, and David Goldsmith, Esquire; and this cause having been heretofore submitted to the court without the intervention of a jury upon the pleadings and proofs herein, and the court, being now fully advised thereof,
24 finds the defendant guilty in manner and form as charged in the complaint, and doth further find that the complainant has sustained damages by reason of the premises to the amount of two thousand nine hundred and seventy dollars, and also that the value of the monthly rents and profits of the said tenements is one hundred and ten ($110.00) dollars.

Thereupon it is ordered and adjudged by the court that the complainant have restitution of the premises found by the court to have been unlawfully detained, being the following-described tracts of land, situate and located in the county of Montgomery, in the State of Missouri, to wit: The southwest fourth of the northwest quarter *of* the north half of the southeast quarter and the south half of the northeast quarter and the northeast fourth of the southwest quarter and the southeast fourth of the northwest quarter and the northwest fourth of the northeast quarter and the north half of the northwest quarter in section No. 9, township No. 50, of range No. 6 west; also the south half of the northeast quarter and the north
25 half of the southeast quarter and the north half of the northeast quarter in section No. 8, in township No. 50, of range No. 6 west; and recover of the defendant the sum of five thousand nine hundred and forty ($5,940.00) dollars, double the sum found by the court for his damages, and also at the rate of two hundred and twenty ($220.00) dollars per month, being double the sum found by the court for rents and profits from the thirtieth day of January, A. D. 1889, until restitution be made, together with costs.

And afterwards, to wit, at said term of court and on the 14th day of March, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

Writ of Error Allowed.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

Now comes the defendant, by attorney, and presents to the court his bill of exceptions, which is allowed, signed, and ordered to be filed and made part of the record herein; and said de-
26 fendant also presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said plaintiff to be and appear at a Supreme Court of the United States on the first day of the next term thereof, to be begun and holden at Washington on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge.

Said bill of exceptions is in words and figures following, to wit:

Bill of Exceptions.

NEWTON DICKSON, Plaintiff,
vs.
DAVID LEHNEN, Defendant.

Be it remembered that at the trial of this cause the following proceedings were had: The plaintiff, to sustain the issues on his part, offered evidence as follows:

Plaintiff read in evidence a lease dated September 24th, 1877, from Edwin H. Farnsworth to Thomas R. Summers; which said lease is in words and figures as follows, to wit:

27 *Lease from Far-sworth to Summers.*

This indenture, made this 24 day of September, A. D. 1877, by and between Edwin H. Farnsworth, of the city of Saint Louis, and State of Missouri, party of the first part, and Thomas R. Summers, of the town of Gunsburgh, Decatur Co., Indiana, party of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, his executors, administrators and assigns, have demised and leased to the said party of the second part, all those premises situate, lying and being in the county of Montgomery, and State of Missouri, known and described as follows, to wit:

The S. W. ¼ N. W. q'r; the N. ½ S. E. q'r; the S. ½ N. E. q'r; the N. ½ S. W. q'r; the S. E. — of the N. W. q'r; the N. W. ¼ N. E. q'rs & the N. ½ of the N. W. ¼; all in section nine (9,) & S. ½ N. E. q'r; N. ½ S. E. q'r; N. ½ N. E. q'r of section eight (8), and the N. ½ and the S. E. ¼ of N. W. q'r sec. 10, all in township 50, range 6 west, con-
28 taining eight hundred acres.

To have and to hold the said above-described premises, with all the privileges and appurtenances belonging to the same, (except such as hereinafter mentioned as reserved for the use and benefit of the said party of the first part), unto the said party of the second part, his executors, administrators and assigns, for a term of eight years commencing on the first day of January, A. D. 1878, and ending on the first day of January, A. D. 1886. And the said Summers is not to underlet said premises unless he has the written consent of said Farnsworth.

And the said party of the second part, in consideration of the leasing of the premises aforesaid by the said party of the first part to the said party of the second part, doth covenant and agree with the said party of the first part, his heirs, executors, administrators and assigns to pay all general and special taxes of every kind accruing against said lands after said 1st day of January, 1878, and during
29 said rental term, and is to exhibit the tax receipts for each year on or before the 1st of January to said Farnsworth, or

agent, or to send them or duplicates to said Farnsworth, & he is to return receipts for same in due time; and said Summers is to erect a good dwelling-house on said land, worth four hundred dollars, and a good barn, worth two hundred dollars, one good cistern well, two good ponds, and plant out the first year 200 good apple trees of choice fruit and keep them in good condition during the lease, and he is to fence it all around with a good fence, and leave the place with a good fence so it will turn stock; and said Summers is to have the use of the timber land thereon, for the purpose of improving said farm, and fire-wood, but not to dispose of any—only A. Kempinsky is to have fire-wood off of the same. Said house and barn to be built at any time during this lease; and he, the
30 said Summers is to cultivate in such crops as he wishes, but is to treat the place all in a good and husbandlike manner.

In witness whereof, the said parties have hereunto, and to a duplicate copy hereof, set their hands and seals the day and year first above written.

EDWIN H. FARNSWORTH. [SEAL.]
THOS. R. SUMMERS. [SEAL.]

JOHN Y. PURVIS.

STATE OF MISSOURI, }
County of Montgomery, } *ss:*

Be it remembered that on this 24th day of Sept., A. D. 1877, before the undersigned, a notary public within and for the county of Montgomery aforesaid, personally came Edwin H. Farnsworth and Thos. R. Summers, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and acknowledged the same to be their act and deed for the purposes therein mentioned. I was qualified as a notary public on the 23d day of November, 1874, and my term expires on the 10th day of November, 1878.

In testimony whereof I have hereunto set my hand and
31 affixed my official seal, at my office, in Wellsville, the day and year first above written.

[SEAL.] JOHN M. BARKER,
Notary Public.

STATE OF MISSOURI, }
County of Montgomery, } *ss:*

I, R. L. Whitehead, recorder of deeds within and for the county aforesaid, do certify that the instrument of writing hereto attached, with the certificate thereon, was filed for record in said office on the 1st day of Oct., 1877, at 8 o'clock a. m., and that the same is duly recorded in said office in Book for Recording 1, at page 108.

In witness whereof I have hereto set my hand and affixed the seal of my said office.

Done at office at Danville this 1st day of Oct., 1877.

[SEAL.] R. L. WHITEHEAD, *Recorder.*

The plaintiff then read in evidence an assignment of said lease from said Summers to Godfrey Lehnen, dated December 13th, 1878; which said assignment is in words and figures as follows, to wit:

Assignment of Lease.

I, Thomas R. Summers, do hereby agree to deliver up to
32 the assignee, Godfrey Lehnen, the leased premises assigned to him by me and described in said lease hereto annexed, during the month of February, A. D. 1879, on a suitable day for both parties and not later than the 15th day of the said month of February, said possession to be delivered to Lehnen without further notice at that time.

Witness my hand and seal this the 13th day of December, A. D. 1878.

THOS. R. SUMMERS. [SEAL.]

Witness:
ROB'T SHACKELFORD.

Plaintiff then read in evidence the consent of said Edwin H. Farnsworth to said assignment of lease; which said consent is dated April 8th, 1879, and is in words and figures as follows, to wit:

Consent to Assignment of Lease.

I hereby certify that the lease from Thomas *B.* Summers to Godfrey Lehnen, assigned by A. Kempinsky as my agent, is all satisfactory.

E. H. FARNSWORTH.

April 8, 1879.

Plaintiff then read in evidence the will of said Farnsworth; which said will is in words and figures as follows, to wit:

33 *Will of Edwin H. Farnsworth.*

Know all men by these presents, that I, Edwin H. Farnsworth, of the city of St. Louis, State of Missouri, being in moderate health and of sound and disposing mind, do make and declare this to be my last will and testament; hereby revoking all or any former will or wills made by me.

First. My will is that all my just debts and funeral expenses be paid by my executor as soon after my death as possible.

Second. I devise and bequeath to my wife, Josephine Farnsworth, the sum of ten dollars; this I deem sufficient in view of the fact that she will be entitled to a dower interest in my estate legally which of course she will have and while she has an ample estate in her own right. We have no children of our marriage.

All the balance of my estate, real, personal and mixed, after the payments of my debts, the allowance of my wife's dower and the bequest above mentioned, I will and bequeath to my only child, my

beloved daughter Barbara Ann Dickson, wife of Newton
34 Dickson of Monroe county, State of West Virginia, and in the event of the death of the said Barbara Ann Dickson before my decease then this interest I devise and bequeath to the child or children of the body of said Barbara Ann Dickson, my object in making this bequest is based not alone upon the natural love and affection I have for my said daughter, but I am indebted to her for large sums of money inherited by her from her grandfather's estate, which money I had for many years used and owe to a great extent my present pecuniary condition to the long use I have had of her money.

I nominate and appoint my friend Marcus A. Wolff to be the executor of this my last will and testament.

Witness my hand and seal this thirteenth day of July, in the year of our Lord one thousand eight hundred and seventy-six.

EDWIN H. FARNSWORTH.

Witnessed by us, the undersigned, who are all personally acquainted with Edwin H. Farnsworth, who signed this instrument in our presence and declared the same to be his last will and
35 testament, and we in his presence and in the presence of each other at his request attach our names hereto as witnesses this thirteenth day of July, one thousand eight hundred and seventy-six.

WILLIAM H. TILFORD.
JAS. K. TAYLOR.
EUGENE MACBETH.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that on this first day of May, A. D. 1879, before me, the undersigned, clerk of the probate court of the city of St. Louis, personally came James K. Taylor and Eugene Macbeth, who, being each by me duly sworn, on their oaths say: "We saw Edwin H. Farnsworth, the testator, subscribe his name to the annexed instrument in writing, bearing date the 13th day of July, 1876, and heard him declare the same to be his last will and testament. We subscribed our names thereto as witnesses in the presence and at the request of the said testator, and at the time of the execution of said instrument as aforesaid and of our subscribing the same as such witnesses he, the said testator, was of sound and dis-
36 posing mind to the best of our knowledge and belief."

JAMES K. TAYLOR.
EUGENE MACBETH.

Sworn to and subscribed before me this first day of May, A. D. 1879.

W. E. WAGNER, *Clerk*,
By C. B. McENTIRE, *D. C.*

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that on this first day of May, A. D. 1879, it being one of the days of the March term of the probate court of the city of St. Louis for said year, an instrument in writing purporting to be the last will and testament of Edwin H. Farnsworth, deceased, is produced in and exhibited to said court; upon examination whereof and of the testimony of James K. Taylor and Eugene Macbeth, two of the subscribing witnesses thereto, it is considered by the court that said instrument in writing is duly proved to be the last will and testament of said Edwin H. Farnsworth, deceased.

Witness Wm. E. Wagner, clerk of said court, and the seal thereof, at office, this 1st day of May, 1879.

[SEAL.] W. E. WAGNER, *Clerk.*

37 STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Wm. E. Wagner, clerk of the probate court within and for the city of St. Louis aforesaid, do hereby certify the foregoing to be a true and complete copy of the last will and testament of Edwin H. Farnsworth, deceased, and of the probate thereof, as fully as the same remains on file and appears of record in my office.

In witness whereof I hereto set my hand and affix the seal of said court, at office, in St. Louis, this 10th day of February, 1886.

W. E. WAGNER, *Clerk,*

[SEAL.] By C. B. McENTIRE, *D. C.*

Plaintiff then read in evidence a quitclaim deed from Mrs. Josephine Farnsworth to Barbara Dickson; which said deed is in words and figures as follows, to wit:

Quitclaim Deed.

This deed made on the 20th day of September, A. D. 1880, by and between Josephine Farnsworth, widow of Edwin H. Farnsworth, deceased, of St. Louis, State of Missouri, party of the first part, and Barbara A. Dickson, of West Virginia, party of the second part, witnesseth:

38 That the said party of the first part, in consideration of one dollar to her paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents remise, release and quitclaim unto said party of the second part, all her right, title, interest and estate in and to the following tracts of land situated in the county of Montgomery, State of Missouri, to wit: The northwest quarter of the N. W. quarter of section (13,) township fifty (50,) range six (6) west, 40 acres; the southwest quarter of the S. E. quarter of section fourteen (14,) township fifty (50,) range six (6,) west, 40 acres; the northwest quarter of the N. W. quarter of section twenty-four (24,) township fifty (50,) range six (6,) west,

40 acres; the north half of the N. E. quarter of section twenty-three (23,) township fifty (50,) range six (6,) west, 80 acres; the southwest quarter of the S. W. quarter of section thirteen (13,) township fifty (50,) range six (6,) west, 40 acres; the east half of the southeast quarter
39 of section fourteen (14,) township fifty (50,) range six (6,) west, 80 acres; the southwest quarter of the S. W. quarter of section nine (9,) township fifty (50,) range six (6) west, 40 acres; the north half of the southeast quarter of section nine (9,) township fifty (50,) range six (6) west, 80 acres; the south half of the northeast quarter of section nine (9,) township fifty (50,) range six (6,) west, 80 acres; the north half of the southwest quarter of section nine (9,) township fifty (50,) range six (6,) west, 80 acres; the south half of the northeast quarter of section eight (8), township fifty (50,) range six (6,) west, 80 acres; the north half of the southeast quarter of section eight (8,) township fifty (50,) range six (6,) west, 80 acres; the southeast quarter of the N. W. quarter of section nine (9,) township fifty (50,) range six (6,) west, 40 acres; the north half of the northeast quarter of section eight (8,) township fifty (50,) range six (6,) west 80 acres; the northeast quarter of the N. E. quarter of section
40 twenty-four (24,) township fifty (50,) range six (6,) west, 40 acres; the northeast quarter of the N. W. quarter of section twenty-four (24,) township fifty (50,) range six (6,) west, 40 acres; the southeast quarter of the S. W. quarter of section fourteen (14,) township fifty (50,) range six (6,) west, 40 acres; the east half of the northwest quarter of section ten (10,) township fifty (50,) range six (6,) west, 80 acres; the northwest quarter of the N. W. quarter of section ten (10,) township fifty (50,) range six (6,) west, 40 acres; the northwest quarter of the N. E. quarter of section nine (9,) township fifty (50,) range six (6,) west, 40 acres; the northeast quarter of the N. E. quarter of section nine (9,) township fifty (50,) range six (6,) west, 40 acres; the northwest quarter of the N. W. quarter of section nine (9,) township fifty (50,) range six (6,) west, 40 acres; the northeast quarter of the N. W. quarter of section nine (9,) township fifty (50,) range six (6,) west, 40 acres; and any and all tracts of land in said county.

41 To have and to hold the same, with all the rights, immunities, privileges and appurtenances thereunto belonging, unto said party of the second part and to her heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set her hand and seal the day and year first above written.

JOSEPHINE FARNSWORTH. [SEAL.]

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that on this 20th day of September, A. D. 1880, before me, the undersigned, a notary public within and for said city and State, came Josephine Farnsworth, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and she acknowledged the same to be her act and deed for the purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office, in St. Louis, the day and year first above written.

[SEAL.] ENRIQUE PARMER,
Notary Public.

STATE OF MISSOURI, }
County of Montgomery, } *ss:*

I, R. L. Whitehead, recorder within and for the county
42 aforesaid, do hereby certify that the instrument of writing hereto attached, with the certificate thereon, was filed for record in my office on the 22d day of Oct., 1880, at 4 o'clock p. m., and that the same is duly recorded in said office in Book 6 for recording deeds, &c., at page 491.

In witness whereof I have hereunto set my hand and affixed the seal of said office. Done at Danville, Missouri, this 22d day of Oct., 1880.

[SEAL.] R. L. WHITEHEAD.

Testimony of David Lehnen.

DAVID LEHNEN, being then called by the plaintiff and being produced, sworn, and examined on the part of the plaintiff, testified as follows:

I am the defendant and reside in Montgomery county, in this State. I took possession of the land herein sued for under the lease to Summers, which has been read in evidence, and remained there one year after this lease had expired. I am a son of Godfrey Lehnen, to whom said Summers assigned said lease, and took possession of the land with the consent of my father.

In 1886 the rental value of this land ranged from two
43 dollars to two dollars and a half per acre, with the exception of 140 acres of timber land and sloughs, which could not be cultivated. I rented the whole 800 acres from Mrs. S. A. Kempinsky for thirteen hundred and fifty dollars.

From 1886 down the land could have been rented as a whole for two dollars an acre, excluding the 140 acres of which I have spoken, and in small lots it would have rented for two dollars and twenty-five cents per acre, with that exception.

Cross-Examination of David Lehnen.

I remained in possession of this land until the first day of March, 1887. S. A. Kempinsky then took possession with my consent. I had a lease for it from Mrs. S. A. Kempinsky, and on and after the first day of January, 1886, I was in possession of this land under that lease. I have that lease. It is dated the fifteenth day of October, 1885, and I now produce it. (Witness here produces the lease spoken of by him.)

Redirect Examination of David Lehnen.

This land lies in Montgomery county, in this State. I
44 know Justice Fyke. He lived in said Montgomery county.
(Plaintiff here produces notice dated January 23rd, 1886, and hands the same to witness.)

This notice, dated January 23rd, 1886, was served on me by the constable.

Said notice, dated January 23rd, 1886, was then offered in evidence by plaintiff. Defendant objected thereto as incompetent, irrelevant, and immaterial; which said objection was overruled by the court, and the defendant then and there duly excepted at the time. Said notice was then read in evidence by the plaintiff, and is in words and figures as follows, to wit:

Notice from Dickson to Lehnen.

To David Lehnen:

I, Newton Dickson, having the legal right to the possession of the premises hereinafter described, hereby demand of you to deliver up to me or my agent, Sol. Hughlett, at Wellsville, Missouri, on or before the 30th day of January, 1886, the possession of the following-described premises, now wrongfully in your possession, to wit: The
45 southwest fourth of the northwest quarter and the north half of the southeast quarter and the south half of the northeast quarter and the northeast fourth of the southwest quarter and the southeast fourth of the northwest quarter and the northwest fourth of the northeast quarter and the north half of the northwest quarter in section No. 9 and the south half of the northeast quarter and the north half of the southeast quarter and the north half of the northeast quarter of section No. 8, all in township No. 50, of range No. 6 west, in Montgomery county, Missouri.

NEWTON DICKSON.

Wellsville, Mo., Jan'y 23rd, 1886.

Served the above notice by delivering a true copy of the same to the above-named David Lehnen.

Done in Upper Loutre township, in Montgomery county, in Missouri, this 23d day of January, 1886.

JAS. B. ELLICOTT,
Constable of Upper Loutre Township,
Montgomery Co., Mo.

Testimony of Newton Dickson.

NEWTON DICKSON, being then sworn and examined on his own behalf, testified as follows:

I am the plaintiff, and reside in West Virginia. I am the
46 husband of Barbara Dickson. I was married to her in May, 1862. My wife Barbara is alive. Mrs. Josephine Farns-

worth, the wife of Edwin H. Farnsworth, has been dead two or three years. She lived and died in Carondelet.

Cross-Examination of Newton Dickson.

Mr. Edwin H. Farnsworth died April 27th, 1879. I did not sign the notice which was just read in evidence. I authorised and directed the notice to be given. Mr. Sol. Hughlett was my agent for the land spoken of and was authorized as my agent to look after my affairs as to everything concerning this land in 1884 and 1885. I was married in West Virginia in 1862.

And here the plaintiff rested.

The defendant then offered in evidence lease, dated April 7th, 1879, from said Edwin H. Farnsworth to S. A. Kempinsky. Plaintiff objected to said lease on the ground that if valid said lease constituted no defense herein, and that, as would be made to appear subsequently, said lease had been cancelled by judgment of
47 the circuit court Audrain county. The court then stated that it would allow said lease to be read for the present subject to said objections, and would subsequently pass on said objections thereto. Said lease was accordingly read in evidence, subject to its being subsequently ruled on by the court, and is in words and figures as follows:

Lease from Farnsworth to Kempinsky.

This indenture, made on this seventh day of April, A. D. 1879, by and between E. H. Farnsworth, of the city of St. Louis, and State of Missouri, party of the first part, and Mrs. M. A. Kempinsky, of the town of Wellsville, and State of Missouri, party of the second part: Witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, her executors, administrators and assigns, has demised and leased to the said party of the second part all those premises situate, lying and being in the county of Montgomery, and State of
48 Missouri, known and described as follows, to wit:

The S. W. ¼ of the N. W. ¼, the N. ½ of S. E. ¼, the S. ½ of the N. E. ¼, the N. ½ of the S. W. ¼, the S. E. ¼ of the N. W. ¼, the N. W. ¼ of the N. E. ¼, the N. ½ of the N. W. ¼, all in section nine (9); and the S. ½ of the N. E. ¼, the N. ½ of the S. E. ¼, the N. ½ of the N. E. ¼ of section eight (8); and the N. ½ of the S. E. ¼ of the N. W. ¼ of section ten (10); all in township fifty (50,) range six (6,) west, containing 800 acres; for a term of ten years, commencing on the first day of January, A. D. 1886, and ending on the 1st day of January, 1896.

Also the following mentioned and described lands situate in said county and State, to wit: The N. ½ of the N. E. ¼ of section twenty-three (23,) township fifty (50,) range six (6,) west, containing 80

acres; for a term of ten (10) years, commencing on the 1st day of March, 1886, and ending on the 1st day of March, A. D. 1896.

Also the following additional mentioned and described
49 lands situate in said county and State, to wit: 40 acres of the W. ½ of the N. W. section thirteen (13,) township fifty (50,) range six (6) west; 40 acres of the S. W. ¼ of the S. E. ¼ of section fourteen (14,) township fifty (50,) range six (6,) west; 40 acres of the N. W. ¼ of the N. W. section twenty-four (24,) township fifty (50,) range six (6,) west; 80 acres of the E. ½ of the S. E. section fourteen (14,) township fifty (50,) range six (6,) west; 40 acres of the N. W. ¼ of the N. E. section twenty-four (24,) township fifty (50,) range six (6,) west; 40 acres of the E. ¼ of the N. W. section twenty-four (24,) township fifty (50,) range six (6,) west; 40 acres of the S. E. ¼ of the S. W. section fourteen (14,) township fifty (50,) range six (6,) west; for and during a term of ten (10) years, commencing on the 2nd day of April, A. D. 1888, and ending on the 2nd day of April, A. D. 1898.

To have and to hold the said above-described premises, with all the privileges and appurtenances belonging to the same, (ex-
50 cept such as hereinafter mentioned as reserved for the use and benefit of the said party of the first part,) unto the said party of the second part, her executors, administrators and assigns, for a term of ten years, commencing, as to the 800 acres first described on the 1st day of January, 1886, and ending on the 1st day of January —; and as to the 80 acres next described to commence on the 1st day of March, 1886, and end on the 1st day of March, 1896; and as to the last mentioned and described lands, to wit: 320 acres, to commence on the 2nd day of April, 1888, and end on the 2nd day of April, 1898, and as above recited and specified.

And the said party of the second part, in consideration of the leasing of the premises aforesaid by the said party of the first part to the said party of the second part, do- covenant and agree with the said party of the first part, his heirs, executors, administrators and assigns to pay the said party of the first part, as rent for the said premises in amount and manner as follows, to wit: One hun-
51 dred and fifty dollars, the receipt whereof is hereby acknowledged; and as a further consideration the said Mrs. S. A. Kempinsky hereby agrees to pay all legal taxes that may be legally assessed against said lands during the said term of ten years, and further agrees to build and erect a good substantial one-story frame house with two rooms, also a good and substantial log or board stable, also to set out in good condition and in a good farmerlike manner 200 fruit trees, 25 shade trees, dig or construct one good commodious pond, one good commodious cistern, and to inclose all of said lands with a good and substantial fence, on or before the expiration of this lease; said buildings and improvements to be erected and put upon such part of said premises as said Farnsworth or his agent may elect, and to be completed one year after this lease expires; that she will at all times during the term of this lease, at her own expense, (except so far as may be hereinafter agreed to the contrary,)

maintain and repair all the buildings and fences belonging to
52 said premises, or which may at any time during said term be erected thereon; and the said premises and every part thereof, in as good repair as they shall be at the commencement of the term of this lease, will peaceably deliver up to the said party of the first part, his heirs, executors, administrators, and assigns, at the termination of this lease, loss by fire, storm and unavoidable accident, and ordinary wear and tear, only excepted.

It is further agreed by the respective parties hereto, and the said E. H. Farnsworth hereby agrees that the said Mrs. S. A. Kempinsky may at any time during said term sublet the foregoing mentioned and described lands or any part of the same; the said Farnsworth however to hold the said Mrs. S. A. Kempinsky responsible for the faithful performance and fulfillment of all the covenants and agreements in this lease, anything herein to the contrary notwithstanding.

It is further agreed on the part of said Farnsworth that
53 at the expiration of this lease the said Mrs. S. A. Kempinsky shall have the first right to purchase said lands described in this lease or any part of the same, to the exclusion of all others.

It is further agreed that the said Mrs. S. A. Kempinsky shall have the right to use such timber during said term as may be necessary for fuel and farm purposes, and for all building, fencing, &c.

In witness whereof, the said parties have hereunto, and to a duplicate copy hereof, set their hands and seals the day and year first above written.

EDWIN H. FARNSWORTH. [SEAL.]

her
SARAH A. x KEMPINSKY. [SEAL.]
mark.

Witness:
C. W. BRANDT.

STATE OF MISSOURI, }
County of Montgomery, } *ss:*

Be it remembered that on this 8th day of April, A. D. 1879, before the undersigned, a notary public within and for the county of Montgomery aforesaid, personally came E. H. Farnsworth, who is personally known to me to be the same person whose name is
54 subscribed to the foregoing instrument of writing as a party thereto, and acknowledged the same to be his act and deed for the purposes therein mentioned.

I was qualified as a notary public on the 18th day of January, 1876, and my term expires on the 18th day of January, 1882.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office, in Wellsville, the day and year first above written.

C. W. BRANETH,
Notary Public.

[SEAL.]

STATE OF MISSOURI, } ss:
County of Montgomery, }

Be it remembered that on the 14th day of April, A. D. 1879, before the undersigned, a notary public, duly qualified January 18th, 1876, for a term expiring January 18th, 1882, within and for the county of Montgomery and State of Missouri, personally came Sarah A. Kempinsky, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of
55 writing as a party thereto, and acknowledged that she executed the same for the uses and purposes therein mentioned and that she authorized the signing of her name to said instrument.

In testimony whereof I have hereunto set my hand and affixed my official notarial seal, at my office, in Wellsville, this 14th day of April, A. D. 1879.

C. W. BRANETH,
[SEAL.] *Notary Public.*

STATE OF MISSOURI, } ss:
County of Montgomery, }

I, R. L. Whitehead, recorder of deeds within and for the county aforesaid, do certify that the instrument of writing hereto attached, with the certificate thereon, was filed for record in said office on the first day of September, 1879, at 9 o'clock a. m., and that the same is duly recorded in said office in Book 6 for Recording Deeds, &c., at page 21.

In witness whereof I have hereto set my hand and affixed the seal of my said office. Done at office, at Danville, Mo., this first day of September, 1879.

56 [SEAL.] R. L. WHITEHEAD, *Recorder.*

The defendant then read in evidence lease from S. A. Kempinsky to Godfrey Lehnen and David Lehnen, dated the fifteenth day of October, 1885, and being the lease of that date mentioned in the testimony of the defendant. The said lease is in words and figures as follows, to wit:

57 *Lease from Kempinsky to G. Lehnen.*

This indenture, made this fifteenth day of October, A. D. 1885, by and between S. A. Kempinsky of the county of Montgomery and State of Mo., party of the first part, and Godfrey Lehnen and David Lehnen of the county of Montgomery and State of Mo., partys of the second part, witnesseth:

That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said partys of the second part their executors, administrators and assigns, ha- demised and leased to the said partys of the second part, all those premises situate, lying and being in the county of Montgomery and State of Mo., known and described as follows, to wit:

The S. W. ¼, N. W. ¼, the N. ½, S. E. ¼, the S. ½, N. E. ¼, the N. ½, S. W. ¼, the S. E. — of the N. W. ¼, the N. W. ¼, N. E. ¼ and the N. ½ of the N. W. ¼, all in sec. nine (9) and S. ½, N. E ¼, N. ½, S. E. ¼, N. ½, N. E. ¼ of sec. eight (8) and the N. ½ and the S. E. ¼ of N. W. ¼ sec. 10, all in township 50, range 6 west containing eight hundred acres.

To have and to hold the said above-described premises, with all the privileges and appurtenances belonging to the same (except such as hereinafter mentioned as reserved for the use and benefit of the said party of the first part), unto the said part*ys* of the second part their executors, administrators and assigns, for a term of one year commencing on the first day of January, A. D. 1886, and ending on the first day of March, A. D. 1887.

And the said party of the first part makes the following reservation, to wit: Reserving —.

And the said part*ys* of the second part, in consideration of the leasing of the premises aforesaid by the said party of the first
58 part to the said part*ys* of the second part, do covenant and agree with the said party of the first part, her heirs, executors, administrators and assigns, to pay the said party of the first part, as rent for the said premises, in amount and manner as follows, to wit:

One note payable on April the sixth, 1886 (eighteen hundred & eighty-six) for the sum of fourteen hundred and fifty dollars, bearing eight per cent. interest after maturity.

And it is further agreed by the said part- of the second part that neither they nor their legal representatives will at all times during the term of this lease, at their own expense (except so far as may be hereinafter agreed to the contrary), maintain and repair all the buildings and fences belonging to said premises, or which may at any time during said term be erected thereon; and it is further agreed by said part*ys* of the second part, that if default shall be made in the payment of any rent, whensoever the same shall become due by the terms of this lease or violation of any other covenant, that said party of the first part, or her legal representatives, shall be entitled to possession of said premises and possession thereof shall be peaceably surrendered by said part*ys* of the second part on demand therefor; and the said premises, and every part thereof, in as good repair as they shall be at the commencement of the term of this lease, will peaceably deliver up to the said party of the first part, her heirs, executors, administrators and a-signs, at the termination of this lease, loss by fire, storm and unavoidable accident, and ordinary wear and tear, alone excepted.

In witness whereof, the said parties have hereunto, and to a duplicate copy hereof, set their hands and seals the day and year first above written.

59

S. A. KEMPINSKY, [SEAL.]
By A. KEMPINSKY. [SEAL.]
DAVID LEHNEN, [SEAL.]
G. LEHNEN, SR.,
By D. LEHNEN. [SEAL.]

DAVID LEHNAN, the defendant, being then duly sworn and examined on his own behalf, testified as follows:

I took the lease dated the fifteenth day of October, 1885, which has just been read in evidence, and on and after the first day of January, 1886, I was in possession under it of the lands which are being sued for in this action. These lands are a part of those conveyed by the lease from Edwin H. Farnsworth to Mrs. S. A. Kempinsky which has been read in evidence.

I negotiated for this lease in October, 1885, both in Canada and at Wellsville, in this State. I negotiated therefor at Wellsville before I went to Canada. Mr. A. Kempinsky, the husband of Mrs. S. A. Kempinsky, and I first spoke about it, and I told Mr. Sol. Hughlett about this and said to him that I was thinking of leasing this land from Mrs. S. A. Kempinsky and asked him whether it was all right. He, Mr. Sol. Hughlett, told me he thought it was all right. I went to Mr. Sol. Hughlett to see him about this because I understood that he was the agent for Mr. Dickson, the plaintiff. After I had this conversation with Mr. Sol. Hughlett, Mr. A. Kempinsky and I went to Canada, where Mr. Godfrey Lehnen, my father, lived. I then told my father what Mr. Sol. Hughlett had said.

This lease was not delivered in Canada. It was written and delivered at Wellsville, in this State, after Mr. A. Kempinsky and I returned from Canada and the note called for by the lease was delivered at the same time.

Cross-examination:

60 I talked with Mr. Hughlett in Wellsville, Montgomery county, Missouri. I talked with him twice—once before I went to Canada and once after I had returned. I cannot say whether I talked with him in his office or on the street. One of these times I know I talked with him on the street. That was the talk I had with him when Mr. A. Kempinsky was with me, and this was after I had returned from Canada. I had then not yet taken the lease. This was at least two weeks after the first talk I had with him, and it may have been three or four weeks.

When I first talked with Hughlett I heard that there was trouble about the lease which Mrs. S. A. Kempinsky had from Mr. Farnsworth, and that they were going to try to set aside the lease. That was why I went to see Mr. Hughlett. I knew how the suit to set aside this lease was decided as soon as the decision was made. I was at the trial in that suit. I was a witness at the trial of the case.

Question by Mr. Broadhead, attorney for plaintiff: Did you know upon what ground the lease was contested?

Objected to by defendant as incompetent, the record of the suit being the only proper evidence.

Objection overruled by the court, and defendant excepted.

(The witness continued:)

I knew the lease was attacked on the ground that Farnsworth did not have good sense; that he was weak-minded.

Mr. Hughlett once told me not to pay the rent to Mrs. S. A. Kempinsky under the lease unless I took a bond of indemnity. I can't tell exactly when he told me that, but it was shortly before the note, which was required by and given in pursuance of this lease, fell due.

When I had the first talk with Hughlett I told him that
61 my father and I were about to rent the land for about one year commencing January 1st, 1886, for thirteen hundred and fifty dollars, and I wanted to know whether the lease would be good if we took it. He told me that Mrs. S. A. Kempinsky had given an appeal bond, and that her lease would be good. I paid to Mrs. S. A. Kempinsky the rent called for by the lease, and in March, 1887, I left the land and turned the same over to Mrs. Kempinsky. When I paid the rent, or, in other words, when I paid the note given under the lease, Mr. Kempinsky gave me a receipt signed by himself and his wife, stating that if anything occurred he would stand good for it. I have this receipt at home.

Redirect examination:

Hughlett told me not to pay the rent to Mrs. Kempinsky unless I took a bond of indemnity. That was shortly before the note fell due in April, 1886. I paid this note in several installments; the last payment was made after harvest.

BEN. ADAMS, being duly sworn and examined on the part of the defendant, testified as follows:

In 1886 I lived near Wellsville and occupied a part of the lands held by Mrs. S. A. Kempinsky under Mr. Farnsworth. I occupied eighty acres of it. I rented it in November, 1885, from Mrs. S. A. Kempinsky and gave a chattel mortgage to secure the rent. I executed this chattel mortgage on November 4th, 1885, and when I did so Mr. A. Kempinsky, the husband of Mrs. S. A. Kempinsky, called on Mr. Sol. Hughlett to take my acknowledgement, and, as I had heard rumors about the difficulty about the lease held by Mrs. Kempinsky, I asked Hughlett whether Mrs. Kempinsky had the right to give me the lease for the land and Hughlett told me she had the right to do so. I rented the land for two years. The chattel mortgage and note had not yet been delivered when
62 Hughlett said this. I have the chattel mortgage. (Witness here produces the same.)

Defendant here read in evidence the chattel mortgage produced by Mr. Ben. Adams, the last witness, and also read in evidence the certificate of acknowledgement attached or appended thereto, said chattel mortgage being dated November 4th, 1885, and said certificates of acknowledgement being dated respectfully November 4th, 1885, and December 3rd, 1885; said chattel mortgage and certificates of acknowledgement are in words and figures as follows:

63 Know all men by these presents that the undersigned, Ben. Adams & John R. Adams, of Montgomery county, in consideration of the sum of two hundred dollars to *him* paid by S. A. Kempinsky, of Wellsville, Mo., do sell, assign, transfer, and set over unto the said S. A. Kempinsky, her executors, administrators, and assigns, one bay mare, 14½ hands high and 8 years old; one brown mare, 14 hands high, 7 years old; one bay mare, 16 hands high, 9 years old, and all the crops that may be raised on this place, rented to him by said S. A. Kempinsky—

Upon condition that if they pay to the said S. A. Kempinsky, her executors, administrators, and assigns one note due February the first, 1887, and signed by him and John R. Adams for the amount of two hundred dollars, then this conveyance shall be void; otherwise to remain in full force and effect; and in case default is made in the payment of the debt above mentioned or any part thereof or of the interest due thereon, on any day when the same ought to be paid, then the whole sum shall, at the election of the said S. A. Kempinsky, become immediately due and payable.

The property hereby sold and conveyed to remain in their possession until default be made in the payment of the said debt and interest or some part thereof; but in case of a sale or disposal or attempt to sell or dispose of said property, or a removal of or attempt to remove the same from Montgomery county, or an unreasonable depreciation in value thereof, the said S. A. Kempinsky or her legal representatives may take the said property or any part thereof into her possession.

Upon taking possession of said property or any part thereof, either in case of default or as above provided, the said S. A. Kempin-
64 sky or her legal representative may proceed to sell the same or any part thereof, at public auction, to the highest bidder, for cash, at post office, in the town of Wellsville, county of Montgomery and State of Missouri, first having given ten days' public notice of the time, terms, and place of sale and property to be sold, by pasting up four printed or written hand-bills in as many public places in said town of Wellsville; and, after satisfying the necessary costs, charges, and expenses incurred by her and paying said debt and interest out of the proceeds of such sale, she shall pay over the surplus, if any, to Ben. Adams or his legal representative.

In witness whereof we have hereunto set our hands and seals this fourth day of Nov'b'r, A. D. 1885.

BEN. ADAMS. [SEAL.]
JOHN R. ADAMS. [SEAL.]

STATE OF MISSOURI, } ss:
County of Montgomery, }

Be it remembered that on this fourth day of November, A. D. 1885, before the undersigned, a notary *of* public within and for the county of Montgomery aforesaid, personally came Ben. Adams, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and

acknowledged the same to be his act and deed for the purposes therein mentioned.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed my official seal, at my office, in Wellsville, in said county, the day and year first above written.

My term expires Jan. 9th, 1889.

SOL. HUGHLETT,
Notary Public.

65 STATE OF MISSOURI, } ss:
County of Montgomery, }

Be it remembered that on this third day of December, A. D. 1885, before the undersigned, a notary public within and for the county of Montgomery aforesaid, personally came John R. Adams, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, and acknowledged the same to be his act and deed for the purposes therein mentioned, and the said John R. Adams further declares to be single and unmarried.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office, in Wellsville, the day and
[SEAL.] year first above written.

My term of office as a notary public will expire Nov'b'r 9th, 1889.

A. JACOBUS,
Notary Public.

STATE OF MISSOURI, } ss:
County of Montgomery, }

IN THE RECORDER'S OFFICE.

I, Silas Carr, recorder of said county, do hereby certify that the within instrument of writing was, on the 10th day of May, A. D. 1886, duly filed for record in this office at 11 o'clock — minutes a. m., and is recorded in the records of this office, in Book 21, at page 199.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my official seal, at Danville, this 10th day of May, A. D. 1886.

SILAS CARR, *Recorder.*

66 *Testimony of A. Kempinsky.*

Mr. A. KEMPINSKY, being then produced, sworn, and examined on the part of the defendant, testified as follows:

I am the husband of S. A. Kempinsky; I have heard all the preceding evidence; I went to see Mr. Sol. Hughlett before the defendant, David Lehnen, and I went to Canada and told him, Mr. Sol. Hughlett, that my wife was thinking of subletting the land which she had leased from Mr. Edwin H. Farnsworth under the lease already read in evidence, and I, on her behalf, asked him if she had

the right to do so. Mr. Sol. Hughlett then told me that my wife did have the right to do this, because she had given an appeal bond in the sum of five thousand dollars.

Mr. Sol. Hughlett also in my presence told the witness, Bent Adams, that my wife had the right to sublet the land to Adams a. the time when he, Hughlett, as notary public, took the acknowledgement of Adams to the chattel mortgage, read in evidence.

I was also present when Mr. Sol. Hughlett, on the street, at Wellsville, in this State, told the defendant, David Lehnen, that my wife had the right to sublet the land to him, the defendant, and his father.

Cross-examination:

I gave the defendant, Lehnen, an obligation to refund whatever he would have to pay if he got into difficulty by retaining the land; it was given in the form of a receipt.

And here the defendant rested.

Plaintiff in rebuttal offered evidence as follows:

The plaintiff offered in evidence a notice dated December 23rd, 1885, and defendant objected thereto as incompetent and irrelevant and especially on the grounds that defendant was not a party thereto; and further that the same could not, so far as appears, have
67 been given until long after the execution of the lease from S. A. Kempinsky to Godfrey and David Lehnen, which has been read in evidence. The objections of the defendant to the notice were overruled by the court and defendant then and there duly excepted to this ruling of the court. Said notice was then read in evidence by plaintiff, and is in words and figures as follows:

To Mrs. S. A. Kempinsky and A. Kempinsky, her husband:

You are hereby notified that we, Barbara Dickson and Newton Dickson, her husband, are the owners in fee and successors to the title of Edwin H. Farnsworth, deceased, under his will, of the following-described lands situate in Montgomery county, Missouri, to wit: The S. W. ¼ of the N. W. qr., the N. ½ of the S. E. qr., the S. ½ of the N. E. qr., the N. ½ of the S. W. qr., the S. E. ¼ of the N. W. qr., the N. W. ¼ of the N. E. qr., the N. ½ of the N. W. qr., all in section No. 9, in township No. 50, of range No. 6 west, and the S. ½ of the N. E. qr., the N. ½ of the S. E. qr., and the N. ½ of the N. E. qr. of section No. 8, in township No. 50, of range No. 6 west, and the N. ½ of the N. W. qr. and the S. E. ¼ of the N. W. qr. of section No. 10, in township No. 50, of range No. 6 west, containing 800 acres, more or less, and we notify you that we decline and refuse to surrender to you or any person or persons claiming under you the possession of the above-described lands under a pretended lease of same from Edwin H. Farnsworth to Mrs. S. A. Kempinsky, dated April 7th, 1879, and recorded in Book No. 6, at page 21, of the records in the recorder's office of Montgomery county, Missouri, for a term commencing on the 1st day of January, 1886, and ending on the 1st

day of January, 1896. Any possession taken by you or any person or persons claiming under you of the said lands or any part thereof under the said lease will be against our will and consent.

This December 23rd, 1885.

68 BARBARA DICKSON.
NEWTON DICKSON.

Served the within notice by delivering to each of the within-named parties, Mrs. S. A. Kempinsky and A. Kempinsky, true copies of this notice.

Done in Upper Loutre township, in Montgomery county, Missouri, this 24th day of December, 1885.

J. B. ELLICOTT,
Constable Upper Loutre T'p, Montgomery Co., Mo.

Plaintiff then recalled A. KEMPINSKY, who testified as follows:

I do not remember the service on me of the notice just read in evidence.

Plaintiff then offered in evidence a certified copy of the record in the suit of Barbara Dickson and Newton Dickson against Sarah A. Kempinsky and A. Kempinsky, her husband, in the circuit court of Audrain county, in the State of Missouri; also mandate and opinion of the supreme court of the State of Missouri in the same suit; which said certified copy, mandate, and opinion were objected to by defendant upon the ground that the same were incompetent, irrelevant, and immaterial as evidence in this cause; which said objections were by the court overruled, and defendant then and there duly excepted to the action of the court in overruling the same.

Plaintiff then read in evidence said certified copy of said record; also said mandate and opinion of the supreme court of the State of Missouri. The same are in words and figures as follows:

69 In the Circuit Court of Montgomery County, Missouri, to the April Term, A. D. 1884.

BARBARA DICKSON and NEWTON DICKSON, Her Husband, Plaintiffs,
vs.
SARAH A. KEMPINSKY and A. KEMPINSKY, Her Husband, D'f'ts.

Plaintiffs state that on the 7th day of April, 1879, and for many years prior thereto, one Edwin H. Farnsworth, a resident of the city of St. Louis, in the State of Missouri, was the owner in fee of the real estate hereinafter described; that on the said 7th day of April, 1879, the said Farnsworth and defendant Sarah A. Kempinsky entered into a written agreement wherein the said Farnsworth, in consideration of the covenants and agreements thereinafter mentioned to be kept and performed by the said Sarah A. Kempinsky, her executors, administrators, and assigns, demised and leased to

the said Sarah A. Kempinsky the following-described real estate situate in the county of Montgomery, in the State of Missouri, to wit: The southwest fourth of the northwest quarter, the north half of the southeast quarter, the southeast fourth of the northwest quarter, the northwest fourth of the northeast quarter, the north half of the northwest quarter, all in section No. nine, and the south half of the northeast quarter, the north half of the southeast quarter, the north half of the northeast quarter of section No. eight, and the north half of the southeast fourth of the northwest quarter of section No. ten, all in t'p No. fifty, of range No. six west, containing 800 acres, for a term of ten years, commencing on the 1st day of January, 1889, and ending on the 1st day of Jan'ry, 1896; also the
70 following-described lands situate in said county and State, to wit: The north half of the northeast quarter of sec. No. twenty-three, in township No. fifty, of range No. six west, containing 80 acres, for a term of ten years, commencing on the 1st day of March, 1886, and ending on the 1st day of March, 1896; also the following lands situate in said county and State: The west half of the northwest quarter of section thirteen, the southwest fourth of the northeast quarter of section No. fourteen, the northwest fourth of the northwest quarter of section No. twenty-four, the east half of the southeast quarter of section No. fourteen, the northwest fourth of the northeast quarter section No. twenty-four, the northeast fourth of the northwest quarter section No. twenty-four, the southeast fourth of the southwest quarter sec. No. fourteen, all in township No. fifty, of range No. 6 west, for and during a term of ten years, commencing on the 2nd day of April, 1888, and ending on the 2nd day of April, 1898, and the said Sarah A. Kempinsky, in consideration of the leasing of said lands to her by the said Farnsworth, covenanted and agreed with said Farnsworth to pay to him as rent for said premises as follows: One hundred and fifty dollars, the receipt of which was acknowledged, and the further consideration that the said Sarah A. Kempinsky agreed to pay all legal taxes that should be legally assessed against said lands during the said term of ten years; and she further agreed to build and erect a good, substantial one-story farm-house with two rooms; also a good and substantial log or board stable; also to set out in a good condition and in a good farmerlike manner two hundred fruit trees, twenty-five shade trees, and dig or construct one good, commodious pond and one good, commodious cistern, and to enclose all
71 of said lands with a good and substantial fence on or before the expiration of said lease; said buildings and improvements should be erected and put upon such part of said premises as said Farnsworth or his agent should elect, and to be completed one year before said lease should expire; and she further agreed that she would at all times during the term of said lease at her own expense (except so far as should be agreed to the contrary) maintain and repair all the buildings and fences belonging to said premises which should at any time during said term be erected thereon; and she further agreed that said premises and every part thereof, in as good repair as they should be in at the commence-

ment of the term of this lease, she would peaceably deliver up to the said Farnsworth, his heirs, executors, administrators, or assigns, at the termination of this lease, loss by fire, storm, and unavoidable accident and ordinary wear and tear only excepted. Said Farnsworth further agreed that the said Sarah A. Kempinsky should have the right at any time during said term to sublet the said lands or any part thereof, the said Fardsworth, however, to hold the said Sarah A. Kempinsky responsible for the faithful performance and fulfillment of all the covenants and agreements in said lease, everything thereon to the contrary notwithstanding; and it was further agreed on the part of said Farnsworth that at the expiration of said lease the said Sarah A. Kempinsky should have the first right to purchase said lands or any part of the same to the exclusion of all others; and, further, that the said Sarah A. Kempinsky should have the right to use such timber during said term as should be necessary for fuel and farm purposes and for all building, fencing, &c.

Plaintiffs state that said agreement was signed and acknowledged by the said Farnsworth and said Sarah A. Kempinsky, and
72 was filed for record by the said Sarah A. Kempinsky in the recorder's office of Montgomery county, Missouri, on the 1st day of September, 1879, and is recorded in Book 6, page 21, of the records of said recorder's office. (A certified copy of said agreement is hereto attached.)

Plaintiff- further states that at the time the said Sarah A. Kempinsky signed and acknowledged the said agreement she was and is now a married woman, the wife of defendant A. Kempinsky, and was then and is now incapable in law of binding and obligating herself to do and perform the various things agreed to be done by her in consideration of said lease, and incapable of entering into the said agreement. Plaintiffs further state that the sum of money recited to have been paid in said agreement and the things to be done by the said Sarah A. Kempinsky in consideration for the said lease are grossly inadequate and unreasonably disproportionate to the true value of the rent of said lands for the said term; and they further state that the said Farnsworth at the time of the execution of said agreement was not capable of entering into said contract or any contract and was incapable of transacting his ordinary business or managing his property by reason of weakness and imbecility of mind produced by disease and old age, and that defendant A. Kempinsky fraudulently took advantage of the imbecility and helpless mental condition of said Farnsworth and induced and procured him to execute the said lease to his (the said Kempinsky'-) wife.

Plaintiff- further states that very soon after the execution of said agreement, to wit, on the 27th day of April, 1879, the said Farnsworth died, leaving a last will and testament, which was duly probated in the probate court, in the city of St. Louis and State of Missouri (the mansion house of the said Farnsworth being
73 in the city of St. Louis at the time of his death); that the said Farnsworth in said last will devised all of the lands hereinbefore described to his only child, Barbara Dickson, the bene-

ficial plaintiff in this case and the wife of Newton Dickson; that the said Farnsworth at the time of his death left a widow, Josephine Farnsworth, who has regularly conveyed to plaintiff Barbara Dickson all of her interest in said lands.

That all debts due by said Farnsworth have been paid and his estate administered on and finally settled in the probate court of the city of St. Louis, and that plaintiff Barbara Dickson is now the fee-simple owner of said lands and in the possession of same, and plaintiffs now brings into court and tender to the said Sarah A. Kempinsky the said sum of one hundred and fifty dollars, the amount of money recited in said agreement to have been paid by her to said Farnsworth as a part of the consideration for said lease, and they pray the court to set aside and cancel and adjudge invalid the said lease and to grant all proper relief arising upon the facts herein stated.

HUGHLETT, HUGHES AND JOHNSON,
Attorneys for Plaintiffs.

STATE OF MISSOURI, }
Montgomery County. }

In Circuit Court.

BARBARA DICKSON *et al.*, Plaintiffs, }
vs. }
SARAH A. KEMPINSKY *et al.*, Defend'ts. }

And now comes the defendants, and for amended answer to plaintiffs' petition herein, leave of court being first had and obtained for that purpose, says that it is true that she is a married woman, as alleged; that she made and executed said contract or lease
74 with said Edwin H. Farnsworth in his life and at the time named for the lands upon the terms named in said petition and went into the possession of the same and still holds the said possession and has done and performed each and every condition and obligation on her part to be performed, named, and mentioned in said contract or lease, and she denies each and every other averment in said petition contained; and she further says that she has a large and valuable separate estate, and the money paid and to be paid under said lease to said leasor was a part of her separate estate, and said lease was made on account thereof and for her separate use; and, having fully answered, she prays judgment for her costs.

FORREST AND FRY,
Attorneys for Defendants.

STATE OF MISSOURI, }
County of Montgomery. }

In the Circuit Court, on 28th Day April, 1885.

BARBARA DICKSON *et al.*, Plaintiffs, }
vs.
ABRAHAM KEMPINSKY *et al.*, Defend'ts. }

On defendants' motion for a change of venue.

Now, on this day, comes the parties, by their respective attorneys, and, this cause coming on to be heard, order of leave is granted by the court to file answer instanter, and thereupon, all and singular the matters and things in said motion contained being submitted to the court and by the court seen and heard, it is considered by the court that said motion be, and the same is hereby, sustained, for the reasons stated in said motion, to wit: "That the opposite party herein, to wit, the plaintiffs, have an undue influence over the minds of the inhabitants of Montgomery county, *when* said
75 cause is now pending, and that the inhabitants of Montgomery county, where said cause is now pending, are prejudiced against these defendants and affiants," &c.

It is therefore considered and ordered by the court that the venue of said cause be, and the same is, changed from this to Audrain county circuit court, and that the clerk of this court make out a full, true, and complete transcript of all the record entries in said cause; and by consent of parties it is further ordered that all the original record and papers herein be transmitted, together with said transcript, duly certified, to the clerk of the circuit court of Audrain county, Mo., and this cause is cont'd.

STATE OF MISSOURI, }
County of Audrain. }

I, Ben. C. Johnson, clerk cir. c't of the county and State aforesaid, do hereby certify that the foregoing copy marked petition and the copy marked answer and the copy marked order changing venue are correct copies as taken from the original petition and the original answer now on file and sent up with the transcript in this cause. I also certify that the copy of the order changing the venue is correct as taken from the clerk's certified transcript in the case, which said cause was filed in the office of the clerk of the circuit court within and for Audrain county, Mo., on the 15th day of May, A. D. 1885, in the cause wherein Barbara Dickson *et al.* are plaintiffs and Sarah A. Kempinsky *et al.* are defendants.

In witness whereof I hereunto set my hand and affix the seal of said clerk's office. This done in circuit clerk's office, Mexico., Mo., this the 17th day of Dec., 1888.

[SEAL.]

BEN. C. JOHNSON,
Clerk Circuit Court.

76 STATE OF MISSOURI, }
County of Audrain. }

In the Circuit Court, June Term, 1885.

BARBARA DICKSON *et al.*, Plaintiffs, }
vs. } "Order to Deposit Money."
Mrs. SARAH A. KEMPINSKY *et al.*, D'f'ts. }

Now, on this the 8th day of June, A. D. 1885, comes the plaintiffs, by their attorneys, and makes a deposit or tender of two hundred and five and $\frac{95}{100}$ dollars, to be kept by the clerk of this court until a final decision or disposition of this case or until an order of court is made ordering the clerk to give up the same.

STATE OF MISSOURI, }
County of Audrain. }

In the Circuit Court, June Term, 1885.

BARBARA DICKSON *et al.*, Plaintiffs, }
vs. }
Mr. SARAH A. KEMPINSKY *et al.*, D'f'ts. }

Now, on this the 8th day of June, A. D. 1885, this cause coming on to be heard, the parties, plaintiffs and defendants, being present, as well by their respective attorneys, *and* say they are ready for trial, and, neither party requiring a jury, the issues are submitted to the court, and the court, after sitting as a jury and hearing the evidence of witnesses and argument of counsel and after fully understanding the issues, doth find for the plaintiffs.

It is therefore considered, ordered, and adjudged by the court that the lease be set aside, cancelled, and held for naught, and that plaintiffs pay the defendants the sum of one hundred and fifty dollars ($150.00), with interest thereon, at the rate of six per
77 cent. per annum, from the date of payment to the plaintiffs until the same was deposited in court, and that plaintiffs recover their costs, and that execution issue therefor.

Whereupon comes defendants, by att'ys, and file their motion for a new trial, and on same day, this cause coming on for hearing on the above motion for a new trial, after hearing the argument of counsel, the motion was "overruled."

Whereupon defendants, by their att'ys, file affidavit and bond for an appeal. The bond was approved by the court and the appeal was granted, and, by consent, leave was given defendants to file their bill of exceptions on or before September 15th, 1885.

STATE OF MISSOURI, }
County of Audrain. }

In the Circuit Court. In Vacation.

BARBARA DICKSON *et al.*, Plaintiffs, }
vs.
Mrs. SARAH A. KEMPINSKY *et al.*, Defend'ts. }

Now, on this the 9th day of September, A. D. 1885, comes defendants, by their attorneys, Forrest and Fry, and, leave of court first being had and obtained, file herein their bill of exceptions, duly signed, sealed, and approved by the judge of this court.

STATE OF MISSOURI, }
County of Audrain. }

I, Ben. C. Johnson, clerk of the circuit court within and for the county and State aforesaid, do hereby certify that the above and foregoing are true copies of the order making a deposit with the clerk, the trial, filing motion for new trial and overruling
78 same, filing affidavit and bond for appeal, appeal granted, leave to file bill of exceptions *are* the filing of same as full and complete as the same are of record in the case Barbara Dickson *et al. vs.* Mrs. S. A. Kempinsky *et al.*

In witness whereof I hereunto set my hand and affix the
[SEAL.] seal of said office. This done in office, in Mexico, Mo., this the 17th day Dec'r, 1888.

BEN. C. JOHNSON,
Circuit Clerk.

STATE OF MISSOURI, }
County of Audrain, } *ss:*

I, Ben. C. Johnson, clerk of the circuit court within and for the county of Audrain, in the State of Missouri, do hereby certify that the foregoing fourteen pages contain a full, fair, and perfect transcript of the record in the case of Barbara Dickson and Newton Dickson, plaintiffs, against Sarah A. Kempinsky and A. Kempinsky, her husband, defendants, as the same appears of record in my office.

[SEAL.] In witness whereof I hereunto set my hand and affix the seal. Done in office this 17th day December, 1888.

BEN. C. JOHNSON,
Clerk Circuit Court.

79 In the Supreme Court of Missouri, October Term, 1888.

BARBARA DICKSON *et al.*, Respondent-, }
vs. } 3833.
SARAH A. KEMPINSKY *et al.*, Appellants. }

Opinion of the Court.

Edward A. Farnsworth owned two tracts of land in Montgomery county, one of which contained 800 acres and the other 440 acres.

On the 24th day of September, 1877, said Farnsworth leased the 800-acre tract to one Summers, term to expire on the first day of January, 1886, and on the second day of April, 1878, he leased the 440-acre tract to defendant S. A. Kempinsky for a term ending on the second of April, 1888. No money rent was reserved in either of these leases. In the lease made to Summers the lease covenanted to erect a dwelling worth $400 and a barn worth $200 on the land, make one good cistern, two good ponds, set out 200 fruit trees the first year and keep them in good condition, fence the whole tract with a good fence and leave the place with a good fence that will turn stock, and to pay all taxes accruing after January 1st, 1878; during said term in this lease the right was reserved to defendant A. Kempinsky to have fir'-wood off the land. In the lease to defendant S. A. Kempinsky of the 440-acre tract she agreed to build on said land one house with four rooms, one stable, set out 100 fruit trees and 25 shade trees, make one well, one pond, fence the land and pay taxes, and maintain and keep in repair all the buildings and fences belonging to said premises.

On the 7th of April, 1879, said Farnsworth executed another lease of both tracts to defendant S. A. Kempinsky for the term of ten years, the 800-acre tract for ten years from the first of January, 1886, and the 440-acre tract for ten years from the second day of
80 April, 1888. In this lease it was expressed that a money consideration of $150 was paid, and the further consideration was that Mrs. Kempinsky covenanted to build on the land a one-story frame house with two rooms, a log or board stable, plant 200 fruit trees and 25 shade trees, make one pond, dig one well or cistern, pay all taxes on the land, and enclose all of it with a good, substantial fence on or before the expiration of the lease, and maintain and repair all the buildings and fences belonging to said premises or which may at any time during the term be erected thereon as they shall be at the commencement of the term of said lease, said buildings and improvements to be erected upon such part of said premises as said Farnsworth may elect and to be completed one year before this lease expires. Farnsworth died on 27th of April, 1879. By his will executed on the 13th of July, 1876, he devised his estate to his only child, Barbara Dickson, the plaintiff, who in February, 1884, commenced this suit to cancel and annul said lease of date April 7th, 1879, on two grounds—first, because said S. A. Kempinsky at the time the lease was made was a married woman and incapable for that reason of binding herself by contract; second, because the consideration for said lease was grossly inadequate, and at the time of the execution thereof the said Farnsworth, by reason of old age and disease, producing weakness and imbecility of mind, was incapable of making said contract or of transacting business or managing his property; and the said defendant A. Kempinsky, taking advantage of his imbecility and helpless mental condition, fraudulently induced and procured the said Farnsworth to execute said lease to his wife, the said S. A. Kempinsky. The answer admitted the execution of the lease, denies the other
81 allegations of the petition, and sets up that the said S. A.

Kempinsky had a large separate estate. On the trial the decree was for the plaintiffs, and orders the said lease to be cancelled upon repayment to defendants of the sum of $150, with interest, from which the defendants appeal.

1. The lessor by the cash payment of one hundred and fifty dollars, made by the lessee at the time the lease was executed, received all the consideration he contracted for up to the time this suit was instituted. By the delivery of the lease and the receipt by the lessor of the cash payment, the contract between them became an executed contract, resting upon a valuable consideration, and it may be conceded in the absence of fraud that the fact that a part of the consideration for the lease consisted of covenants in the lease to be performed by the lessee during the term which she might not thereafter perform, and for her failure she could not be held personally responsible by reason of her coverture of which the lessor had knowledge, could not alone afford ground for invoking the power of a court of equity to cancel the lease. 1 Taylor Landlord & Tenant, sec. 105, sec. 107; 2 Bishop Married Woman, sec. 250; Neef *v.* Redmon, 76 Mo., 195; Walker *v.* Owen, 79 Mo., 563; Draper *v.* Stonevenal, 35 N. Y., 507; Chamberlain *v.* Robertson, 31 Iowa, 409. The decree rendered by the trial court cannot be sustained on the first ground stated in the petition.

2. The only remaining question is whether the evidence is sufficient to sustain the second averment, in which it is in substance charged that the execution of the lease by Farnsworth was procured by defendant A. Kempinsky, the husband of said lessee, by fraud, in terms sufficiently specific to authorize this court, after judgment, without any objection having been made in the
82 trial court at any time to the petition, to consider any legitimate testimony in the record tending to show that its execution was procured by fraud, imposition, or undue influence, and in determining the question whether or not it was so obtained it may be conceded in the start that neither old age, disease, mental weakness, inadequacy of consideration, or confidential relations are *per se* independent and substantive grounds upon which courts of equity will interfere to relieve a party from a contract voluntarily entered into for a valuable consideration, nor will the mere existence of any one or all of these afford sufficient cause for avoiding such a contract; they are only important factors to be considered in determining in any given case whether a fraud has been perpetrated. Fraud in all such cases is the ground upon which courts of equity give relief. Its vermiculations can hardly ever be traced. All the means by which it accomplishes its purpose can seldom be pointed out; its actual existence rarely shown by positive evidence; to discover it and destroy the web which it may have woven around its deluded victim in the form of a contract is the peculiar and appropriate exercise of the jurisdiction of courts of equity, and "whenever in conscience the existence of a contract cannot be accounted for except as the product of fraud or imposition it becomes the delicate but imperative duty of the chancellor to declare it fraudulent though actual fraud be not proven." The contract of a person with another known

to be *non compos mentis* not just in itself or for the benefit of such unfortunate is *ipso facto et constructione legis* fraudulent, and fraud will be inferred in a contract made with a person of weak mind not amounting to imbecility or unsoundness when the consideration is grossly inadequate, unless it appear that such weak-minded person had
83 an intelligent comprehension of the disadvantageous nature of the contract to himself and purposed the benefit to be obtained under it by the other party or upon some reasonable hypothesis founded upon the facts in the case, other than that of fraud, imposition, or undue influence, such contract can be reasonably accounted for. 2 White & Tudor Leading Cases, 2 part, p. 1242; 1 Story Equity, sec. 227, 228, 234, 235, 236, 237, 244, 246; 2 Pomeroy's Equity, 926 *et seq.* In the application of these well-recognized principles to the case in hand the first inquiry is, was the consideration grossly inadequate? By the terms of the lease Mrs. Kempinsky was for a term of ten years, commencing at the expiration of the previous leases, to have the use, rents, and profits of twelve hundred and forty acres of land improved in the manner provided for in those leases. Such a body of land unclosed, broken, and improved in the manner contemplated from the evidence in the case would have been worth per annum about one dollar and seventy cents per acre; over $2,000 per annum for the whole term. For this Farnsworth received $150 in cash. The covenant of a married woman without estate, so far as the evidence shows, to pay the taxes, keep the improvements and fences in repair during the term; loss by fire, storm, and unavoidable accident and ordinary wear and tear excepted; one year before the expiration of the term to make improvements of the value of about five hundred dollars, and before its termination to enclose said lands with a good, substantial fence. Making the most liberal estimate of the value and extent of the outlay that could be required under the contract, and conceding that all the covenants of the lessee would be performed, Mrs. Kempinsky, for the sum of $150 in cash and an expenditure of five or six hundred dollars
84 for improvements, could for nine years enjoy this estate worth over $2,000 per annum without any additional outlay other than such insignificant amounts as might be required to pay taxes and keep the premises in repair, as provided for, and for the whole term an additional outlay for fencing less than the value of the premises for a single year would satisfy all the requirements of the contract. The whole outlay of the lessee, if it had been made in accordance with the terms of the lease, could not have ex-
85 ceeded and in all probability would have fallen far short of one-sixth of the value of the term granted. This would have been the consideration received by the lessor if the covenants of the lease had been performed. What he did in fact receive was one hundred and fifty dollars in money and those worthless covenants of a married woman. Large deductions may be made from the estimated value of that estate for overestimates and for contingencies that might affect its realization; yet it must be conceded after all such reasonable deductions are made. The consideration for the

lease remains greatly inadequate. The inadequacy of that consideration is demonstrated in another way not dependent upon the uncertain estimates of witness of the value of future rents. It is found in the fact that this same land in the previous leases, in a state of nature wholly unproductive of any rents, was leased for a like term upon covenants involving a contemplated outlay of more than three times the amount required in this lease, the performance of which was assured to the lessor, in the fact that alone by making those improvements could the land be made productive of any value to the lease. The expense of a fence, a house, a stable, a well, and a pond are by no means the only outlay required to place wild land in a condition for profit by cultivation or for renting.

What was Farnsworth's mental condition at the time the contract was made? The evidence tends to show that at the time of the execution of his will (July 13th, 1876) he was of sound mind, and nothing in the evidence tends to show that he was not in like mental condition up to and including the time when the first lease was executed to Mrs. Kempinsky on the 2nd of April, 1878. Dr. Hornsby, who had been his physician since 1859, testified that he was a sufferer from necrosis of the tibia of one of his legs and had some peculiarities, but up to the time he last saw him he was entirely competent to
86 transact business; when that was he could not state, whether in 1879 or not. Marcus A. Wolf, who was his financial agent and intimate friend, and who was made the executor of his will, and who was intimately acquainted with him for many years, testified that he drew his will; "up to that time, so far as his financial affairs were concerned, his mind was perfectly clear; he was one of the most economical and careful men in his business affairs I ever knew; he was almost penurious in his habits. About a year or more before his death his intellect was feeble; in other words, his memory did not seem to be as retentive, and he overlooked subjects of business that before that he was very careful about; he forgot his taxes until a penalty attached to them, when he had money in my hands to pay them with. There were tenants of his who had been his tenants for years who he thought had moved away or died, and when I would tell him the party had paid his rent he would say, 'Oh, yes; I forgot; I was thinking of something else.' After talking to him a few minutes he would generally come back to the subject and understand it. He had some domestic trouble at home and his mind would continually revert to that subject in talking about business affairs." The last time that Wolf saw him was probably on the sixth of April, 1879, the day before this lease was signed. In this condition of mind and body he left St. Louis on the 7th and arrived about noon of that day at Wellsville, in Montgomery county; went to the office of defendant A. Kempinsky, whose guest and constant companion he remained until noon of the next day, the 8th, when he was taken by Kempinski to the train going west towards Macon City. During this twenty-four hours' sojourn with Kempinski this lease was executed. Its terms, in language that can scarcely be misinterpreted, suggests the condition of his mind when it was done. Within the next

twenty-four hours he is found (about noon of the following day)
87 fallen at the door of the room in the court-house of Macon City, where the board of equalization was in session. He crawled into the room looking wild and haggard, but weak and debilitated; prostrate in body and mind, he was picked up, placed in a chair at the table, but did no business, and evidently was in no condition to do business. A day or two later he is found at the homes of two of his old friends, one a relative in Monroe county, physically helpless and mentally imbecile, where he lingered until the 27th of the same month, when he died (having only $22 in money in his possession) of blood poisoning caused by his chronic disease. When this contract is analysed and viewed in the light afforded by the testimony of Farnsworth'- mental and physical condition the day before and the day after its execution the conviction is forced upon the minds that it was the product of fraud or imposition upon a diseased mind, a conclusion irresistible unless something is to be found in the previous transactions of Farnsworth, the circumstance attending its execution, the relations of the parties or the condition of his mind on the day of its execution, by which it may be accounted for on some other reasonable hypothesis.

We have seen that the previous leases, in their consideration, furnish no presumption to weaken the force of this conclusion, and these are the only transactions suggested to that end. In fact, in view of the condition in which his land was placed by those leases, this one, by a man of his age and health, whose lands were disposed of satisfactorily for a period beyond which he could not in reason hope to live, could only give occasion for surprise and astonishment even if made for a confessedly adequate consideration. In the relation he sustained to the Kempinskis nothing is discovered to lead to the belief that they had any claims on or were likely to
88 be recipients of his bounty. While the confidence he is shown to have placed in the husband at least invites a careful scrutiny of the circumstances attending the execution of the contract and of the testimony as to the condition of his mind at that time; for these circumstances resort must be had principally to the evidence of Kempinski, from which it appears that he was a real-estate agent; that officing with him was a notary public named Brandt; that Farnsworth was in the habit annually of visiting Montgomery county to see after his lands and pay his taxes and of coming to his office; that after the arrival of the train on the seventh of April he came to his office; that after talking about some lands Farnsworth owned in Audrian county, and which he wished Kempinsky to lease for him, they agreed upon the terms of this lease to Kempinsky's wife; that about five o'clock in the afternoon he took Farnsworth in a buggy to his house, distant about a mile from his office, where he staid until the next day. The lease was prepared by Brandt, by him brought to Kempinsky's house, and that night after supper was signed by Farnsworth, to whom he then paid one hundred and fifty dollars, and Brandt asked him if he acknowledged the lease to be his act; this was all done in the presence of several persons besides Brandt (who died before the trial) and

whose names the witness gives, but none of whom were called as witnesses, nor does any witness testify of whom it can be said with any degree of certainty that he conversed with Farnsworth on the seventh except Kempinsky, who says that Farnsworth was then well, except his sore leg, and in good mental condition. The next morning Farnsworth was taken to Kempinsky's office in a buggy where the lease was read to him by Brandt, who then wrote the certificate of acknowledgment on it. About noon he was taken to the train in a wagon with Kempinsky and departed on his last jour-
89 ney. During the twenty-four hours that he was in Wellsville he transacted no business with any one except Kempinsky, and during that period no communication was had with him by any one without the shadow of Kempinsky's presence. Of the other nine witnesses, who it is claimed saw and talked with him at intervals during that period and whose testimony is relied upon to show that Farnsworth was then of sound mind and capable of understanding and transacting business, two were evidently testifying to what occurred in interviews previous to that time; probably in 1878. The interview that two others had with him who were acquainted with him before that time was of the most casual character, in which the salutations of the day were simply passed and the usual chat interchanged about health, weather, and the prospects of business, and that, with still two others to whom he was for the first time introduced by Kempinsky, consisted merely of the usual commonplace character
90 of first introductions; to the first two he appeared to be as formerly; the latter two observed no defect in him, mental or physical, in the few minutes passed by them in his company. Of the other three David Leonard, at whose instance Kempinsky had obtained from Farnsworth the night before a written consent to the transfer of the Summers lease to his (Leonard's) father, and who saw him at the depot with Kempinsky on the eve of his departure, says: "I talked a little with him. He told me he was glad we had got the lease; that Summers had to give it up. He told me to work the land the same as though it was our own. I could not see anything wrong about him. I thought he was a man of good business." The remaining two witnesses, Hammock and Simpson, saw Farnsworth in Kempinsky's office at the reading of the lease. Hammock says substantially: "Brandt was reading an instrument to
90½ him. I inferred it was a lease. He was a fluent reader. When he got through Farnsworth asked him to read it again; to read it slowly, as near as I can remember, I heard Farnsworth say." He was endeavoring to get his land in shape so that it would realize something in the near future; he wanted the land in a shape to suit purchasers. I told him where I had first met him and in whose company I was. He remembered the circumstances, but did not remember me as a man. I did not speak to him long. He talked as though he understood his business. It never occurred to me that he was incapable; did not observe him enough to determine his mental or physical condition. I was standing up; he was sitting down. I have told about all that was mentioned.

Simpson, the other witness who was present at this reading,
91 says: Kempinsky gave me an introduction to Farnsworth. "I found him in good business capacity, and he had Brandt read said lease twice to him, as he did not thoroughly understand it the first time."

It thus appears that of the ten witnesses upon whose testimony reliance is placed to show mental capacity in Farnsworth at the time this contract was executed four only, Kempinsky, Leonard, Hammock, and Simpson, had anything like an opportunity to form an intelligent opinion on the subject. Of the two first, who were the beneficiaries of the only business he transacted at that time, the opinion that he was capable of transacting it was to be expected. If the other two could have known that the contract he had executed and that was then being read to him was a lease by which an old man past three score and ten, in feeble health, who was
91½ desirous of getting his lands in shape so that it would realize something in the near future and in a condition to suit purchasers, was in fact taking that land out of market and placing it in a condition so that it would realize him absolutely nothing for seventeen and nineteen years, the process of ratiocination by which they reached the conclusion that he was in good business capacity and understood what he was doing would be a strange one indeed. The effect produced on the mind of an ordinarily rational man by this evidence is that neither he nor they understood the meaning and effect of the contract he was making.

It is much to be feared that Brandt was a too fluent reader for either of them. However this may be, when we view this feeble-minded and feeble-bodied man, weighed down with old age, disease, and domestic trouble, away from friends and from
92 every one capable of giving him disinterested advice, in the hands of one in whom the evidence shows he had and was placing confidence twenty-four hours only before his mind was plunged into almost utter oblivion, in connection with this unconscie*nce*able contract obtained from him by the one in whom he confided during the period that he remained his guest, we find nothing in the evidence of these witnesses, in the circumstances which attended the execution of this contract or in the relations the parties sustained to each other, sufficient to create a reasonable doubt but that this lease, so far as he was concerned, is either the product of a mind incapable of comprehending its force and meaning or of a weak one imposed upon.

It can be accounted for on no other reasonable hypothesis; whichever was the case, it is the product of fraud and ought to
92½ be cancelled.

The judgment of the circuit court is affirmed.

All concur except Ray, J., absent; Sherwood, J., in the second paragraph only.

THEO. BRACE, *J.*

STATE OF MISSOURI, *set:*

I, Henry W. Ewing, clerk of the supreme court of Missouri, do hereby certify that the foregoing is a true copy of the opinion of said court delivered in the foregoing-entitled cause on the 12th day of November, 1888, as fully as the same appears on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court. Done at office, in the city of Jefferson, State aforesaid, this 13th day of November, 1888.

[Seal of the Supreme Court of Missouri.]

HENRY W. EWING, *Clerk*,
By ROWAN RAY, *D. C.*

Supreme Court of Missouri, October Term, 1888.

BARBARA DICKSON and NEWTON DICKSON, Her Husband, Respondents,
vs.
SARAH A. KEMPINSKY and A. KEMPINSKY, Her Husband, Aplants.

Appeal from Audrain county circuit court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently
93 advised of and concerning the premises, do consider and adjudge that the judgment aforesaid in form aforesaid by the said Audrain county circuit court rendered be in all things affirmed and stand in full force and effect; and it is further considered and adjudged by the court that the said respondents recover against the said appellants their costs and charges herein expended and have thereof execution. (Opinion filed.)

STATE OF MISSOURI, *set:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the judgment of said supreme court, entered of record at the October term thereof, 1888, and on the 12th day of November, 1888, in the above-entitled cause.

Given under my hand and the seal of said court, at the city of Jefferson, this first day of December, 1888.

(Signed) H. W. EWING, *Clerk*,
[SEAL.] By ROWAN RAY, *D. C.*

94 SOL. HUGHLETT, being then produced, sworn, and examined on the part of the plaintiff, testified as follows:

After the defendant came back from Canada he told me that he and his father had leased the land from Mrs. Kempinsky and he asked me if I thought he would get into trouble. I told him that Mrs. Kempinsky's lawyers claimed that she had a right to make the

lease, because she had given an appeal bond, and that we claimed, on the contrary, that she had no right to make the lease. I also told him that if he leased from Mrs. Kempinsky I did not think, considering his relations with Kempinsky, that Kempinsky would see him suffer. I was not acting for Mr. Dickson in that matter.

I never on any occasion intimated to Lehnen that Mrs. Kempinsky's lease would be all right.

Cross-examination:

I did not have such a conversation with Adams as he states. I took his acknowledgment to the chattel mortgage read in evidence and said nothing about the right of Mrs. Kempinsky to make the lease to Adams. I sued Adams for possession of the land leased to him nineteen days after he went into the possession thereof under his lease from Mrs. Kempinsky.

I told Lehnen that I did not think that Kempinsky would let him pay the money twice. All my conversations related to the effect of the appeal bond. After January, 1886, I told Lehnen if he would not pay the rent to Mrs. Kempinsky I would guarantee that Dickson would not charge him any interest. I also served a notice on the defendant not to pay the rent to Mrs. Kempinsky. This is the notice to which I refer. (Witness here produces paper.) It is dated February 27th, 1886.

Plaintiff then offered in evidence the notice, dated February 27th, 1886, produced by the last witness, Hughlett. Defend-
95 ant objected thereto on the ground that it does not purport to have been given until after the institution of this suit and as otherwise incompetent, as irrelevant, and immaterial. All of said objections were by the court overruled and defendant then and there duly excepted to the action of the court in overruling the same. Said notice was then read in evidence by plaintiff and is in words and figures as follows:

To David Lehnen & Godfrey Lehnen:

You are hereby notified that I am the owner and entitled to possession of the southwest fourth of the northwest quarter and the N. ½ of the S. E. ¼ and the south half of the northeast quarter & the northeast ¼ of the S. W. qur. & the southeast fourth of the northwest qur. & the north W. fourth of the N. E. qur. & the N. ½ of the north-W. qur. in sec. 9 & S. ½ N. E. ¼ & N. ½ S. E. qur. & the N. ½ N. E. qur. sec 8, all in township 50, R. 6 west, in Montgomery, and that I am entitled to all rents and profits off of said lands after the 1st day of January, 1886, and you are hereby notified to pay the same to me Feb. 27th, 1886.

NEWTON DICKSON,
By HUGHES & HUGHLETT, *Att'ys.*

Served the within notice by delivering to David Lehnen, one of the within-named parties, a true copy of this notice. Done in Upper

Loutre township, in Montgomery county, Missouri, this 27th day of Feb., 1886.

JOS. B. ELLICOTT,
Constable of Upper Loutre Township, Montgomery County, Mo.

It was then admitted by all the parties to this action, to wit, by the plaintiff and defendant, that immediately after the rendi-
96 tion of the final judgment of the circuit court of the county of Audrain, of the State of Missouri, shown by the certified copy of the record in the suit of Barbara Dickson and Newton Dickson, her husband, against Sarah A. Kempinsky and A. Kempinsky, her husband, and during the same term of said circuit court of Audrain county and on the same day on which said final judgment was rendered, the said Sarah A. Kempinsky and A. Kempinsky, her husband, the defendants in said suit, appealed to the supreme court of the State of Missouri from said judgment, and to that end made and filed during said term and on said day in said suit their affidavit stating that such appeal was not made for vexation or delay, but because they, the affiants, believed that they, the appellants, were aggrieved by the said judgment: and it was also admitted by plaintiff and defendant that the said appeal was then and there duly made and was then and there duly allowed by said circuit court of Audrain county; and, further, that during said term and on said last-named day and at the time of the said allowance of said appeal the said appellants, Sarah A. Kempinsky and A. Kempinsky, made and filed in said suit a supersedeas bond, which was then and there approved by the said circuit court of Audrain county, and that said bond in all respects was a good and sufficient bond and complied with and satisfied the requirements of the statutes of this State in regard to such supersedeas bonds, to wit, section 3713 of the Revised Statutes, 1879, of Missouri.

And this was all the evidence.

And thereon the defendant requested the court to declare the law to be as follows:

97 The court declares the law to be that under the evidence the plaintiff is not entitled to recover; which said declaration of the law requested by the defendant the court refused to give, and the defendant then and there duly excepted to the action of the court in refusing to give and make such declaration of the law.

And the defendant further at the same time then and there requested the court to declare the law to be as follows:

The court declares the law to be that if the court should find from the evidence that the lease from S. A. Kempinsky to defendant and his father which was read in evidence was executed by the parties thereto in 1885 and delivered in said year, and that the lands thereby leased are the same which are *used* for in this action, and are also comprised in those leased by Edwin H. Farnsworth to said S. A. Kempinsky by the lease dated April 7, 1879, which was also read in evidence, then the court should find for the defendant; which said declaration of the law requested by the defendant the

court refused to give, and the defendant then and there duly excepted to the action of the court in refusing to give and make such declaration of the law.

And the defendant further at the same time then and there requested the court to declare the law to be as follows:

The court declares the law to be that if the court should find from the evidence that the lease from S. A. Kempinsky to defendant and his father which was read in evidence was executed by the parties thereto in 1885 and delivered in said year, and that the lands thereby leased are the same which are sued for in this action, and are also comprised in those leased by Edwin H. Farnsworth to said S. A. Kempinsky by the lease dated April 7, 1879, which
98 was also read in evidence, then the court should find for the defendant; and if the court further finds from the evidence that on January 2, 1886, and at the time of the commencement of this action and at all times between January 2, 1886, and the commencement of this action the defendant held possession of the said lands under said lease and in the *bona fide* belief that he had the right so to do, then the court should find for the defendant; which said declaration of the law requested by the defendant the court refused to give, and the defendant then and there duly excepted to the action of the court in refusing to give and make such declaration of the law.

And the defendant further, at the same time, then and there requested the court to declare the law to be as follows:

The court declares the law to be that if the court should find from the evidence that the lease from S. A. Kempinsky to defendant and his father, which was read in evidence, was executed by the parties thereto in 1885 and delivered in said year, and that the lands thereby leased are the same which are sued for in this action, and are also comprised in those leased by Edwin H. Farnsworth to said S. A. Kempinsky by the lease dated April 7, 1879, which was also read in evidence, then the court should find for the defendant; and that — the defendant and his father became parties to and accepted said lease in the *bona fide* belief that said S. A. Kempinsky had the right to make said lease to them, then the court should find for the defendant; which said declaration of the law requested by the defendant the court refused to give, and the defendant then and there duly excepted to the action of the court in refusing to give and make such declaration of the law.

And the defendant further, at the same time, then and there requested the court to declare the law to be as follows:

99 The court declares the law to be that even if the court should find from the evidence that the defendant held over the possession of the lands herein sued for after the termination of the lease from Edwin H. Farnsworth to one Summiers, which was read in evidence, still if the court should further find from the evidence that the defendant held said possession after the termination of said lease, not contumaciously, but in the *bona fide* belief that he had the right so to do, then the court should find for the defendant; which said declaration of the law requested by the defendant the

court refused to give, and the defendant then and there duly excepted to the action of the court in refusing to give and make such declaration of the law.

And the defendant further, at the same time, then and there requested the court to declare the law to be as follows:

The court declares the law to be that if the court should find from the evidence that the lease from S. A. Kempinsky to defendant and his father, which was read in evidence, was executed by the parties thereto in 1885 and delivered in said year, and that the lands thereby leased are the same which are sued for in this action and are also comprised in those leased by Edwin H. Farnsworth to said S. A. Kempinsky by the lease dated April 7, 1879, which was also read in evidence, then the court should find for the defendant; and if the court should further find from the evidence that prior to the execution of said lease from said S. A. Kempinsky to the defendant and his father an appeal was taken by said S. A. Kempinsky and her husband from the decree of the circuit court of the county of Audrain, which has been read in evidence, and that on such appeal and during the term of said court at which said decree was rendered -- made and filed in the said cause the supersedeas bond men-
100 tioned in the evidence, and that said bond and the sufficiency of the sureties therein was during said term approved by said circuit court, then the court should find for the defendant; which said declaration of the law requested by the defendant the court refused to give, and the defendant then and there duly excepted to the action of the court in refusing to give and make such declaration of the law.

And the defendant further, at the same time, then and there requested the court to declare the law to be as follows:

If the court finds from the evidence that in 1886 one Sol. Hughlett, knowing that the defendant proposed to take a lease from S. A. Kempinsky for the lands herein sued for a term commencing on or after January 2, 1887, represented to the defendant that said S. A. Kempinsky had authority to make such a lease, and that the defendant believed said representation to be true, and in such belief and upon the faith of such representation afterwards, together with his father, accepted the lease from said S. A. Kempinsky to him and his father, which has been read in evidence and delivered to said S. A. Kempinsky the note called for by said lease; and if the court further finds from the evidence that said Col. Hughlett was at the time of said representation the attorney for plaintiff and the plaintiff's agent for the recovery of the possession of said land, then the court should find for the defendant.

Which said declaration of the law requested by the defendant the court refused to give, and the defendant then and there duly excepted to the action of the court in refusing to give and make such declaration of the law.

101 And thereupon the court rendered a written opinion in this cause and entered judgment for plaintiff in this cause in pursuance of such written opinion, and in and by said written opinion the court sustained the objections heretofore made by the

plaintiff herein to the admissibility as evidence of the lease from Edwin H. Farnsworth to S. A. Kempinsky, dated April 7th, 1889, hereinbefore set forth, and did exclude said lease from the evidence; and the defendant then and there duly excepted at the time to the action of the court in sustaining said objections of the plaintiff and in thus excluding said lease; and the defendant did further then and there, at the time of the rendition of said written opinion, duly except to each and every finding of fact in said opinion made and to each and every declaration of the law therein contained; and said written opinion was in words and figures as follows:

102 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

NEWTON DICKSON
vs.
DAVID LEHNEN. } No. 2683. At Law.

This was an action of unlawful detainer under section 2420 of the Revised Statutes of Missouri, which declares, *inter alia*, that "when any person shall wilfully and without force hold over any lands, tenements, or other possessions, after the termination of the time for which they were demised or let to him or the person under whom he claims, * * * such person shall be deemed guilty of an unlawful detainer."

Plaintiff's ancestor, Edwin H. Farnsworth, heretofore leased 800 acres of land situated in Montgomery county, Missouri, to Thomas H. Summers for a term of eight years ending January 1st, 1886. Defendant became the assignee of the lease and entered into possession of the demised premises and remained in possession to the end of the term. Subsequently, on January 7th, 1879, Farnsworth granted another lease for the same premises to one S. A. Kempinsky for the term of ten years, to commence on January 1st, 1886, when the first lease terminated.

Farnsworth died April 27th, 1879, and thereafter this plaintiff, who was his devisee, brought suit against Kempinsky in the State court to cancel and annul the last-mentioned lease on the ground of fraud. A decree annul-ing the same was rendered by the State circuit court on June 8th, 1885, from which decree the defendant therein prosecuted an appeal to the State supreme court, giving a supersedeas bond.

The decree of the circuit court was affirmed by the supreme
103 court in November, 1888.

Pending the appeal and on October 15th, 1885, Kempinsky leased said premises to the defendant Lehnen for a term of fourteen months, to commence January 1st, 1886, when the lease under which defendant then held expired.

At the time of the subletting last referred to defendant knew of the suit affecting the Kempinsky lease and had been a witness on the trial of the same in the circuit court, and was aware that it was pending on appeal in the supreme court.

On December 24th, 1885, plaintiff notified Kempinsky that any possession taken by the latter or by persons claiming through him under the pretended lease of April 7th, 1879, then in litigation, would be against plaintiff's will and consent.

On January 23rd, 1886, defendant being still in possession, not having surrendered the premises to plaintiff and claiming to hold them under Kempinsky, plaintiff made written demand of defendant for possession, and, the demand not being complied with, subsequently on February 6th, 1886, brought this action of unlawful detainer.

The complaint was originally filed before a justice of the peace in Montgomery county, was thence taken to the circuit court of the county by writ of certiorari, and thence removed to the Federal court on the ground of diverse citizenship.

James O. Broadhead and G. B. Macfarlane, attorneys for pl'ff.

D. P. Dyer and David Goldsmith, attorneys for defendant.

THAYER, *District Judge* (after stating the facts as above):

As this action is brought under a local statute, the various questions that have been discussed must be decided in strict con-
104 formity with the law of the State as interpreted by its highest courts.

The main contention on the part of the defendant seems to be that the court has no power in this proceeding to determine whether the lease granted by Farnsworth to Kempinsky on April 7th, 1879, was valid or invalid, as that would involve a trial of title as to which no inquiry can be had in actions of forcible entry and detainer.

Section 2443, Revised Statutes of Missouri.

It follows, of course, as a corollary from this proposition that, in the opinion of defendant's counsel, the record of the decree of the circuit and supreme court of the State annul-ing the lease in question is not admissible in evidence.

If that view is correct the result would be, in my opinion, that the defendant would have no right to introduce the Kempinsky lease on which he wholly relies to justify his holding over after the termination of the lease under which he originally entered. The legislature by prohibiting inquiry into the merits of title in this class of cases could not have intended to allow a tenant who has wilfully held over after the termination of a given lease to justify his act under a subsequent lease or deed executed by the lessor, and at the same time to prohibit the lessor or his heir from showing that such subsequent lease or deed was a forgery or had been obtained by fraud or had never been delivered. The construction of section 2443, *supra*, contended for by defendant's counsel, would logically confine the proof strictly to the questions whether the defendant was a tenant of the plaintiff and had held over after the end of his term and neither party would be allowed to proceed a step beyond that point.

As defendant admits both of these facts, he has no defence
105 to the action if the position assumed is tenable.

The fact is that it has often been held in this State that a tenant when sued for an unlawful detainer committed by holding over may show that since the date of his lease the lessor has parted with his reversion by a voluntary conveyance of the same or that he has been divested of the same by a sale *in invitum* under execution upon a judgment, and that he (the tenant) has attorned to the vendee or purchaser under execution, as section 3080 Revised Statutes of Missouri permits him to do.

Kingman *vs.* Abington, 56 Mo., 46.
Pentz *vs.* Kuester, 41 Mo., 447.
Higgins *vs.* Turner, 61 Mo., 250.
Gunn *vs.* Sinclair, 52 Mo., 327.

Such a defence has never been regarded as an inquiry into the merits of the title within the meaning of section 2443, *supra*, and it is not made such by permitting the lessor to go a step further and to show as against his tenant that the deed invoked by the latter and under which he has attorned or attempted to attorn is a forgery or was void *ab initio* for fraud.

Under the decisions in this State there is a well-marked distinction between cases where a tenant merely holds over and for that is guilty of an unlawful detainer and cases where possession is obtained by a disseizin—that is, by force or by an original, wrongful entry without force.

In cases of the latter kind the question of title cannot be raised. The trial is confined strictly to proof or disproof of the acts amounting to a disseizin.

But in cases of the former kind where a tenant holds over, defendant may, as before shown, give in evidence deeds executed by his lessor, and when this is done an inquiry into the validity of such conveyance is, in my opinion, proper.

106 May *vs.* Luckett, 54 Mo., 438.
Same *vs.* Same, 48 Mo., 472.

As defendant can only justify a holding over by an attornment made under a certain class of deeds, and cannot set up an outstanding title hostile to his lessor, there cannot as a matter of course be a general inquiry into the merits of title in this class of suits.

It is next insisted for the defendant that the Kempinsky lease must be held to have been valid when his suit was begun, notwithstanding the fact that six months before that time it had been adjudged by the circuit court to be null and void, because an appeal had been taken from the decree and a supersedeas bond given.

The appeal undoubtedly stayed for the time being the execution of the decree. It has no other effect. It did not operate to vacate the decree, and certainly it did not make that a valid lease at any time which was finally adjudged to be void *ab initio* on the ground

of fraud. The decree of the State circuit court (the same having been affirmed in the supreme court) is offered in this case as conclusive evidence of a fact affirmed by the plaintiff, namely, that the lease in question never was a valid instrument, and it is competent for that purpose.

The second contention of the defendant's counsel is accordingly overruled.

When this suit was brought and when his term expired on January 1st, 1886, and when he took a lease of Kempinsky on October 15th, 1885, defendant had knowledge that plaintiff claimed that the lease of April 7th, 1879, was void, and that it had been so held by the State circuit court. In the light of these facts there appears to me to be no merit in the plea, that the case should be treated
107 precisely as it might be if defendant's lessor, Kempinsky, had held a valid lease and been entitled to possession of the premises in dispute on January 1st, 1886. Defendant appears to have taken the chances, with full knowledge of all the facts, that the title which he elected to recognize would prove valid.

It is next insisted that plaintiff's attorney and agent, Mr. Hughlett, made representations to defendant before he took a lease from Kempinsky as to the latter's right and power to make a valid lease, which representations should estop the plaintiff from denying defendant's right to hold over under the lease from Kempinsky.

Of this contention it is only necessary to say that there is much conflict of evidence as to the nature of the alleged representations, and the burden is on the defendant to show what they were. I conclude that Mr. Hughlett went no further in that matter than to express an opinion as to the effect the giving of an appeal bond by Kempinsky had on his right to execute leases pending the appeal, and even if it be conceded that the opinion expressed was in support of such right, it appears to me that it concerned a question of law only arising on a state of facts as well known to defendant as to Mr. Hughlett, and that in giving such advice the latter cannot be regarded as acting for the plaintiff, and that for both reasons the plaintiff is not estopped in the manner claimed or in any manner.

In addition to the points already considered, notice must be taken of the point made by plaintiff's counsel, that the lease granted to Kempinsky on April 7th, 1879, being for a term to commence nearly six years thereafter, did not vest him with any estate, even if it had been valid, but merely gave him a future right of entry upon the demised premises, which right could only be enforced by suit in ejectment or by an action for damages for failure to
108 give possession if prior to the commencement of the term the lessor or his heir notified the lessee not to enter.

There can be no doubt that at common law and under the laws of this State a lease to commence in future does not, like a deed, vest the lessee with an estate. Such an instrument creates only an *interesse termini*. It is of an executory character and does not even give the lessee a constructive possession. Until actual entry with

the lessor's consent, possession remains with the holder of the title, if there is no actual occupant.

Austin *vs.* Huntsville Coal & Mining Co., 72 Mo., 541, and cases cited.
Michan *vs.* Walsh, 6 Mo., 346.
1st Washburn Real Prop., 442, 4th ed.
4 Kent Com., 106, 11th ed.
1 Greenleaf Cruise, 243.
Wood, Land and Tenant, secs. 224 and 225.

Such being the nature of a lease to commence in future, I am of the opinion that defendant had no right in any event to surrender the possession to Kempinsky without first obtaining his landlord's consent, and that he certainly had no right to so surrender the possession after a controversy as to the validity of Kempinsky's lease had arisen and the latter had been warned not to take possession.

Defendant's duty was to restore possession to his landlord under whom he had entered or to his heir. If he had vacated the premises Kempinsky would have had no right to take possession in opposition to the wishes of the plaintiff.

May *vs.* Luckett, 48 Mo., 472.

Section 3080 Revised Statutes of Missouri, before alluded to, only allows a tenant to attorn to a stranger with consent of his landlord or to the same one who has acquired the lessor's estate and seizin since the letting by a deed executed by the lessor or by virtue of a sale under an execution against him. The statute does not
109 recognize the tenant's right to surrender the premises in his charge, or to attorn to a mere lessee whose term is to begin after the tenant's term expires and who has no estate by virtue of his lease until he is let into possession by the owner of the premises.

There will be a judgment for plaintiff. The damages are assessed at $2,970.00, and the monthly value of the rents and profits at the sum of $110.00.

110 And thereafter, on the second day of February, 1889, and in due time, to wit, within four days after the rendition of said written opinion and said judgment of the court and during the same term, the defendant filed his motion for a new trial, which was in words and figures as follows:

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri.

In the Circuit Court of the United States for said District.

NEWTON DICKSON
vs.
DAVID LEHNEN. } No. 2683.

Now here, at this day, comes the defendant and moves the court to set aside the verdict and judgment in the above cause and to grant him a new trial for the reasons following, to wit:

1. The verdict and judgment is contrary to the evidence in the cause.
2. The verdict and judgment is against the weight of said evidence.
3. The verdict and judgment is against the law.
4. The verdict and judgment is against the law and the evidence.
5. The verdict and judgment should have been for the defendant instead of for the plaintiff.
6. The court erred in refusing instructions asked by the defendant.
7. The court erred in excluding evidence offered by the defendant.
8. The court erred in admitting (against the objections of
111 defendant) evidence offered by the plaintiff.
9. The court erred as to the law in the case in the opinion rendered.

D. P. DYER &
DAVID GOLDSMITH,
Att'ys for Def't.

And thereafter, on the twenty-eighth day of February, 1889, said motion for a new trial was overruled by the court (the court rendering a written opinion thereon), and defendant then and there duly excepted at the time to the action of the court in overruling the same. Said opinion being in words and figures following, to wit:

112 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

NEWTON DICKSON
vs.
DAVID LEHNEN. } No. 2683.

James O. Broadhead and G. B. Macfarlane, attorneys for plaintiff; D. P. Dyer and David Goldsmith, attorneys for defendants.

Opinion of the Court on Motion for New Trial, February 28th, 1889.

THAYER, *District Judge:*

In deciding this case the court held that it was competent for the plaintiff to show that the Kempinsky lease was void *ab initio* and that the record in the case of Dickson *vs.* Kempinsky, in the circuit court of Audrain county, Missouri, established such fact.

Whilst conceding that it was competent to show that the lease was void *ab initio*, a new trial is asked by the defendant on the ground that the record in the case last referred to only shows that the lease in question was set aside on the ground of "undue influence," and it is insisted that, as this is a legal proceeding, the instrument cannot be here attacked on that ground or for any reasons except such as show that the lease was void from the begin-

ning. As no evidence affecting the lease was offered except the record in question, it must, of course, stand or fall according as the same is admitted or excluded.

An examination of that record shows that the petition in the case alleged that Fransworth, the lessor, was without legal
113 capacity to make a contract when the lease was executed. The sole allegation in the petition tending to impeach the same was "that said Farnsworth at the time of the execution of said agreement (meaning the Kempinsky lease) was not capable of entering into said contract or any contract and was incapable of transacting his ordinary business or managing his property by reason of weakness and imbecility of mind, produced by disease and old age, and that defendant fraudulently took advantage of the imbecility and helpless mental condition of said Farnsworth and induced and procured him to execute said lease."

Now, the foregoing is not a charge that the lease was procured by "undue influence" and for that reason was merely voidable. It is an averment that Farnsworth was an imbecile and unable to make a contract of any kind, and so the circuit court of Audrain county must have found, as it was the sole averment in the petition concerning the lease that could have invalidated it or warranted the decree entered in that case.

The fact so alleged in the petition in said cause rendered the lease void *ab inito*, and under a plea of *non est factum* the matter so alleged might have been proven in a legal proceeding to avoid the lease. In the absence of mental capacity to make a contract the lease was an absolute nullity.

It is suggested that the circuit court of Audrain county must have tried the question of undue influence, as the case before it was not otherwise one of equitable cognizance, unless it be regarded as a suit to remove a cloud upon the title, and that it cannot be so regarded, as plaintiff was not in possession.

But how is this latter suggestion at all material at the present time?

114 This court must assume that the State court tried the issue that was raised by the pleadings. The issue so raised was clearly as to the mental capacity of Farnsworth and not as to undue influence, which was not charged. It may be conceded that the bill in the State court was really a bill to remove a cloud upon the title, and that the petition failed to allege that the Dicksons were in possession, and that the proof in this case shows that in point of fact they were not in possession. Such concessions do not affect the validity of the decree in the State court. They show that a defence of a certain character, not reaching the merits of the controversy, was perhaps not made in the State court, but was waived or overlooked.

According to the decision in Clark *vs.* The Covenant Mutual Life Insurance Company, 52 Mo., 272, the State court was authorized to presume that the Dicksons were in possession, and may have done so.

When the decree is offered in this court as evidence of a conclusive character that Farnsworth was without mental capacity to

make a contract, and that the lease by him signed was for that reason not a lease, but so much waste paper, the suggestion above referred to cannot avail the defendant. This court will not go outside of the pleadings to determine what issue was tried and determined in the State court.

What has been said disposes of the points made in the second paragraph of defendant's brief. Conceding that the position taken by defendant's counsel would perhaps be tenable if the issue raised by the pleadings in the State court in the case above referred to had been one of undue influence merely, the whole argument fails of its purpose, forasmuch as it appears that the sole issue was one of mental capacity to make a contract, and that it was determined adversely to the defendant.

2nd. It is unnecessary to allude to the first proposition
115 advanced by defendant's counsel in their brief, but, in view of what occurred when the motion was argued, I cannot refrain from saying (but without intending a decision on the point) that the case of L'Hussier *vs.* Zallee, 24 Mo., 14, appears to me to be in conflict with the later decision in May *vs.* Luckett, 48 Mo., 472, and 54 Mo., 438.

As I understand the decision in L'Hussier *vs.* Zallee, the court held that a person who had granted a lease to take effect on the termination of a former lease could not maintain an action of unlawful detainer against the first tenant if he held over, because by granting the second lease he had parted with his right of possession, which was necessary to maintain such an action. Because of this ruling the court of appeals, in the case of Kelly *vs.* Clancy, 15 Mo. Appeals, 520, felt itself bound to hold that though the landlord could not maintain an action of unlawful detainer, yet that the second lessee might do so; that he was an assignee of the lessor within the meaning of the statute, sections 2453 and 2454 R. S. of Mo., 1879.

Now, in May *vs.* Luckett (*supra*) it was held that even though all the lessor's interest in the demised premises had been sold under execution, so that he had neither title or right of possession, yet that he might maintain an action of wrongful detainer against the holder of the title, who had bought under execution and had entered peacefully after the lessor's tenant had left the demised premises vacant at the end of his term.

I confess that I cannot reconcile May *vs.* Luckett with L'Hussier *vs.* Zallee.

The former case seems to me to overrule the latter and to obviate the necessity of placing the broad construction on the term "assignee," evidently for the purpose of giving some one a right of
116 action for unlawful detainer that was adopted in Kelly *vs.* Clancy, *supra*.

The true doctrine seems to me to be that a lessor who has granted a term to begin in future at the close of a preceding term has the right to the possession of the demised premises at the end of the first term for the purpose of investing the second tenant with possession, according to his contract so to do.

This is in harmony with the doctrine that a lease to commence in future is purely executory and creates a mere *interesse termini*. It is also in harmony with section 3080 R. S. of Mo., 1879, which does not mention a subsequent lessee as a person to whom a tenant in possession may attorn, unless with the consent of his landlord.

The idea that a landlord who has a positive duty to perform—that is, to let his tenant into possession at the commencement of his term—has no right to sue another tenant in possession who wilfully holds over until the second tenant has elected to sue him for breach of covenant seems to me quite anomalous.

I think the simple and just rule is that a tenant at the end of his term should in all cases surrender to his landlord unless he attorns to some one of the persons specially enumerated in section 3080 (*supra*).

In view of the fact that double rent is accumulating I have given these motions prompt attention on receipt and examination of the briefs. The motions for new trial are overruled.

117 And now the defendant presents this bill of exceptions and prays the court to allow, sign, and seal the same, and that the same may be filed herein and made a part of the record herein; all of which is done this 14th day of March, 1889.

AMOS M. THAYER, *Judge*. [SEAL.]

And afterwards, to wit, on the 27th day of March, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

NEWTON DICKSON, Plaintiff,
vs. } 2683.
DAVID LEHNEN, Defendant.

Now comes defendant, by attorney, and presents to the court his bond in the penal sum of seven thousand five hundred dollars, which bond is approved by the court and ordered to be filed as part of the record herein, and thereupon on motion it is ordered that a supersedeas be awarded staying further proceedings on the judgment herein.

Said bond is in words and figures following, to wit:

118 Know all men by these presents that we, David Lehnen, Gottfried Lehnen, Samuel Kniepfel, A. Kempinsky, and Gottlieb Lehnen, Jr., are held and firmly bound unto Newton Dickson in the full and just sum of seven thousand five hundred dollars, to be paid to the said Newton Dickson, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19 day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the September term, 1888, of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, in a suit depending in said court between Newton Dickson, plaintiff, and David Lehnen, defendant, judgment was rendered against the said David Lehnen, and the said David Lehnen having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Newton Dickson, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said David Lehnen shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

DAVID LEHNEN. [SEAL.]
GOTTFRIED LEHNEN, SR. [SEAL.]
SAMUEL KNIEPFEL. [SEAL.]
A. KEMPINSKY. [SEAL.]
GOTTFRIED LEHNEN, JR. [SEAL.]

I consider this bond good. This March 25, '89.

SOL. HUGHLETT.

Approved by—

AMOS M. THAYER,
Judge Dist. Court.

[Endorsed:] No. 2683. United States circuit court, eastern division of the eastern judicial district of Missouri. Newton Dickson *vs.* David Lehnen. Bond, $7,500.00. David Lehnen, principal. —— ——, sureties. Filed 27th day of March, 1889. A. P. Selby, clerk.

119 UNITED STATES OF AMERICA, *Eastern Division of the Eastern Judicial District of Missouri,* } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record, pleadings, and proceedings in case No. 2683, of Newton Dickson, plaintiff, against David Lehnen, defendant, as fully as the same remain on file and of record in said case in my office.

Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this first day of June, in the year of our Lord eighteen hundred and eighty-nine.

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2683. United States circuit court, eastern division of the eastern judicial district of Missouri. Newton Dickson against David Lehnen. Duly certified transcript in the above-entitled cause.

Endorsed on cover: Case No. 13,699. E. Missouri C. C. U. S. No. 125. David Lehnen, plaintiff in error, *vs.* Newton Dickson. Filed October 5, 1889.

148 U.S. 71

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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

DAVID LEHNEN,
Plaintiff in Error,
vs.
NEWTON DICKSON,
Defendant in Error.

Term No. 125.

STATEMENT, BRIEF AND ARGUMENT.

D. P. DYER AND
DAVID GOLDSMITH,
Attorneys for Plaintiffs in Error.

CONTINENTAL PRINT, 515 N. THIRD ST.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

DAVID LEHNEN,
Plaintiff in Error,
vs.
NEWTON DICKSON,
Defendant in Error.

Term No. 125.

STATEMENT.

This is an action of unlawful detainer instituted by the defendant in error, Newton Dickson, against the plaintiff in error for the possession of certain lands in Montgomery county, Missouri. The action was instituted before a justice of the peace for that county, and was thence removed, first, to the Circuit Court of Montgomery county, and subsequently to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. The trial in the

latter court resulted in a judgment in favor the plaintiff in the action, Mr. Dickson, for the possession of the premises, and for the sum of five thousand nine hundred and forty dollars ($5,940), as damages, and also for rental value at the rate of two hundred and twenty dollars per month from the date of the rendition of the judgment until restitution should be made. The defendant in the action then sued out a writ of error.

In mentioning the parties hereinafter we shall refer to them by their original relation to the cause; that is, we shall refer to Mr. Dickson as the plaintiff, and to the present plaintiff in error as the defendant.

With the exception of one matter, which is not material, there is no controversy or dispute of the facts; these are as follows:

The land sued for was leased by one Farnsworth to one Summers in 1877 for a term of years expiring January 1, 1886. This lease was, with the consent of Farnsworth, assigned to Godfrey Lehnen, the father of the defendant, and the defendant entered into possession of the land under it.

Subsequently, in 1879, Farnsworth leased the same lands to Mrs. Sarah A. Kempinsky for a term of ten years, commencing on January 1, 1886, Mrs. Kempinsky besides her covenants in the lease paying him a consideration of one hundred and fifty dollars therefor. Thereafter Farnsworth died and his title passed to his daughter, Mrs. Dickson, the wife of the plaintiff in this cause.

In 1884 Mr. and Mrs. Dickson instituted a suit in the Circuit Court of Montgomery county to have the

lease made to Mrs. Kempinsky canceled. This suit will hereinafter be referred to by us as the equity suit. It was transferred to the Circuit Court of Audrain county, by which a decree was rendered on June 8, 1885, whereby the lease to Mrs. Kempinsky was set aside and canceled, and the plaintiffs, Mr. and Mrs. Dickson, were adjudged to pay the said sum of $150 interest to Mrs. Kempinsky. From this decree an appeal was at once, namely, on June 8, 1885, duly taken by the defendants, Mr. and Mrs. Kempinsky, to the Supreme Court of the State of Missouri, and these defendants at the same time duly "made and filed in said suit a supersedeas bond, which was then and there approved by said Circuit Court of Audrain county, and said bond in all respects was a good and sufficient bond, and complied with and satisfied the requirements of the statute of this State in regard to such supersedeas bonds, to-wit, Section 3713 of the Revised Statutes, 1879, of Missouri." (Printed record, pages 37 and 48.)

This being the condition of things, Mrs. Kempinsky on October 15th, 1885, made a lease of the lands in question to the defendant and his father for a term of fourteen months, commencing on the 1st day of January, 1886 (the date of the expiration of the lease from Farnsworth to Summers, hereinbefore referred to), and ending on the 1st day of March, 1887. Prior to the execution of this lease the defendant called on a Mr. Hughlett, who was the attorney of Mr. Dickson, the plaintiff in this action, and authorized to look after Mr. Dickson's affairs as to everything concerning this land (printed record, page 22), and spoke to Mr. Hughlett

in regard to Mrs. Kempinsky's right to lease the land to him in view of the prior decree of the Circuit Court of Audrain county, by which the lease under which Mrs. Kempinsky claimed had been set aside. What occurred on that occasion is the only controverted fact in this cause. According to the evidence of the defendant, Mr. Hughlett stated on that occasion that Mrs. Kempinsky had the right to make the lease to the defendant, because she had appealed and given a supersedeas bond, and the lease was accepted and executed by the defendant and his father in reliance upon that statement. Mr. Hughlett, however, testifies for the plaintiff that he only stated that Mrs. Kempinsky claimed to have that right. The trial court in its written opinion in this cause concluded "that Mr. Hughlett went no further in that matter than to express an opinion as to the effect the giving of an appeal bond by Kempinsky had on his right to execute leases pending the appeal," but does not seem to have definitely determined whether the opinion expressed was in support of such right. (Printed record, page 54.)

Upon the termination of the lease from Farnsworth to Summers, under which the defendant had entered, namely, on January 1, 1886, the defendant remained in possession under the lease made to him by Mrs. Kempinsky, he having previously given his note for fourteen hundred dollars for the rent under the latter lease. On January 23, 1886, the plaintiff demanded in writing from the defendant the possession of the premises, and, the demand not being complied with, he on February 6, 1886, instituted his present action of unlawful detainer against the defendant.

The defendant remained in possession of the land until the termination of the lease executed to him by Mrs. Kempinsky, namely, until March, 1887, and then surrendered the possession to Mrs. Kempinsky. After this surrender of possession, namely, in the fall of 1888, the Supreme Court of Missouri, rendered a decision in the equity case, affirming the decree of the Circuit Court of Audrain county for the cancellation of the lease to Mrs. Kempinsky. That opinion is naturally in writing, and will be found at pages 38 to 45 of the printed record. It reviews the evidence in the cause, and bases the decree of affirmance upon the ground of fraud, imposition or undue influence, in the procurement of the lease; at least that is our contention, and we think that there is no good ground to question the correctness of our view.

Outside the decree in the equity case, there was no evidence whatsoever impeaching the validity of the lease to Mrs. Kempinsky.

When that lease was offered in evidence, the plaintiff objected to its admissibility upon the ground "that, as would be made appear subsequently, said lease had been cancelled by judgment of the circuit court of Audrain county. The court then stated that it would allow said lease to be read for the present subject to said objections, and would subsequently pass on said objections thereto. Said lease was accordingly read in evidence, subject to its being subsequently ruled on by the court." (Printed record, page 22).

No express ruling was subsequently made by the court, but such ruling is necessarily implied by the views expressed in the written opinion of the court in

rendering judgment, which were to the effect that the lease was invalid as a matter of law under the evidence, and even that, even if valid, it would not have constituted a defense to this action.

The defendant objected to the admissibility of the transcript of the proceedings and judgment in the equity case on the ground that the evidence was incompetent, irrelevant and immaterial, and, his objections being overruled, duly excepted thereto. (Printed record, page 32.)

The defendant also asked the court to give the following declarations of law, all of which were refused by the court, and to the refusal whereof the defendant duly excepted, namely:

The court declares the law to be that under the evidence the plaintiff is not entitled to recover.

The court declares the law to be that, if the court should find from the evidence that the lease from S. A. Kempinsky to defendant and his father, which was read in evidence, was executed by the parties thereto in 1885, and delivered in said year, and that the lands thereby leased are the same which are sued for in this action, and are also comprised in those leased by Edwin H. Farnsworth to said S. A. Kempinsky by the lease dated April 7, 1879, which was also read in evidence, then the court should find for the defendant.

The court declares the law to be that, even if the court should find from the evidence that the defendant held over the possession of the lands herein sued for after the termination of the lease from Edwin H. Farnsworth to one Summers, which was read in evidence, still if the court should further find from the

evidence that the defendant held said possession after the termination of said lease, not contumaciously, but in the *bona fide* belief that he had the right so to do, then the court should find for the defendant.

These rulings will be urged as error herein, and our claim will be:

1. That as a matter of law the lease to Mrs. Kempinsky was valid for the purposes of this action, and constitutes a good defense.

2. That the evidence leads necessarily to the conclusion that the defendant acted in good faith and not contumaciously, and that it therefore fails to establish such a willful holding over by the defendant as essential to a recovery herein.

BRIEF AND ARGUMENT.

I.

The trial court, as we understand its written opinion, held that, even if the lease to Mrs. Kempinsky was valid for the purposes of this action, it nevertheless fails to furnish any defense, because even then the defendant had no right at the expiration of the Summers' lease to attorn to Mrs. Kempinsky or deliver possession to her, but was bound to surrender the demised premises to his immediate lessor. The correctness of that position will be first considered by us.

That position seems to us to be unquestionably opposed to all authorities. If the lease to Mrs. Kempinsky was valid for the purposes of this action, then she was a grantee or assign of Mr. Farnsworth, and as such was entitled to the delivery of possession, and, consequently to attornment directly from the prior tenant, whether Mr. Farnsworth, or his devisees, consented thereto or not.

It is a well-settled proposition, as to which all of the authorities are in accord, that, if a lease be made to commence from the date of the expiration of a prior term of another tenant of the lessor, the lessee is entitled to the delivery of the possession of the premises directly from such prior tenant, and can, on refusal

thereof, enforce his right to possession by a direct action against the prior tenant.

L'Hussier *v.* Zallee, 24 Mo. 13;
Sigmund *v.* Howard Bank, 29 Md. 324;
Gazzoto *v.* Chambers, 73 Ill. 75;
Gardner *v.* Keteltas, 3 Hill, (N. Y.) 330;
Taylor on Landlord and Tenant, 8th ed., Secs. 176, 312, pp. 201, 358, 359.

It necessarily follows that, in such case, the lessor himself is not entitled to receive from the prior tenant without suit, or to recover from the prior tenant by suit, the possession of the premises: for, neither the right of possession nor the right of action can at the same time be in both the landlord and his lessee. And such is the direct holding of

L'Hussier *v.* Zallee, 24 Mo. 13;
Pentz *v.* Kuester, 41 Mo. 447;
Pendergast *v.* Young, 21 N. H. 234.

The latter proposition determines the question under consideration by denying the plaintiff's right of action altogether.

The only point as to which there is any divergence of authority is as to whether, when the prior tenant refuses to deliver possession, the lessee has any right of action against the lessor for breach of covenant. On this proposition the English authorities and the case first above cited from the reports of Missouri, give the lessee, at his election, either a right of action for possession against the prior tenant, or a right of action for breach

of covenant against the lessor, while the other authorities above cited restrict the lessee to a suit for possession against the prior tenant, and deny his right of action against his lessor. That matter cuts no figure in the present argument, and is alluded to only in explanation of the remarks in *L'Hussier v. Zallee*, *supra*, that the lessor therein was not entitled to sue for possession, since no action for breach of covenant had been brought against him by the lessee.

The learned judge of the trial court, in passing upon our motion for a new trial herein, recognized and conceded the conclusiveness of *L'Hussier v. Zallee*, *supra*, unless overruled by later authorities, but held, or seemed inclined to hold, that, that decision had been overruled by the later case of *May v. Luckett*, 48 Mo., 472; s. c. 54 Mo., 437. There is no warrant for any such contention. The opinion in *May v. Luckett*, in no way refers to or concerns the prior decision in *L'Hussier v. Zallee*. It merely holds that a purchaser under an execution sale has no right, without the consent of the judgment debtor, to take possession without suit of lands in the immediate possession of such judgment debtor, and is guilty of a forcible entry if he does so. Upon a like theory it has been held that the landlord himself is guilty of a forcible entry, if he takes possession of the demised premises after the expiration of the term of his tenant, but against the will of the tenant. *Hyde v. Fraher*, 25 Mo. App. 414. Both of these cases depend upon principle, that a person entitled to the possession of land has no right to take it forcibly or against the will of the person in actual possession, but must proceed by legal action; and we are

therefore unable to comprehend their relevancy to the matter under discussion.

It would be sufficient for us therefore to rely upon *L'Hussier v. Zallee* and *Pentz v. Kuester*, *supra*, as conclusively establishing that the present action of unlawful detainer cannot be maintained. We desire, however, to add a few words in regard to the argument of the learned judge of the trial court that the defendant had no right to attorn to Mrs. Kempinsky, if her lease was valid at law. The fact that Mrs. Kempinsky could, if her lease was valid at law, have enforced her right of possession by direct action against the defendant, necessarily determines the right of the defendant to attorn to her. If the law would compel the defendant to deliver possession, it certainly would permit him to do the same thing without suit. And such is the holding of the very case relied upon by the learned trial judge, namely, *May v. Luckett*, 48 Mo. 472, 474, where the Supreme Court of Missouri says: "If the landlord's grantee is enabled to dispossess the tenant, they are placed in direct relation to each other, and it is but reasonable that the tenant should be enabled to attorn him, as is held in *Pentz v. Kuester*." And in *Pentz v. Kuester*, 41 Mo. 447, 449, thus referred to, it is said: "There would be neither reason nor justice in requiring the lessee in such case to submit to an action of unlawful detainer before acknowledging the right of such grantee to the possession of the premises. His attornment to him must be considered as lawful and as made with the consent of the landlord." It remains but to add parenthetically that the statutes invoked in *Pentz v. Kuester* are still in force.

II.

From what we have said, it appears that the plaintiff had no right to possession, and was not entitled to institute this suit therefor after the commencement of the term of the lease to Mrs. Kempinsky, if that lease was valid for the purposes of this action. We are accordingly brought to the question of the force and effect of that instrument.

That lease can only be held invalid upon one of two grounds, to-wit:

1. That it never had any legal efficacy, or, in other words, was void *ab initio.*

2. That its legal efficacy was abrogated by the decree of the Circuit Court of Audrain county annulling it, and that such was the effect of that decree for our present purposes, notwithstanding the *supersedeas* resulting from the appeal and the execution of the appeal bond.

The opinion of the learned judge of the trial court deals exclusively with the first of these two propositions. No stress or reliance is placed by him upon the second ground, either in his written opinion at the time of the rendition of judgment, or in his subsequent opinion in overruling our motion for a new trial; indeed, this second ground is not at all considered by by him. (Printed record, pages 52–55, 56–59.)

Taking up the first of these grounds, it is to be observed that the present action is unquestionably one at law. The jurisdiction of the Circuit Court of the United States in it is predicated upon that of the justice of the peace before whom this action was com-

menced, and a justice of the peace has no equity powers whatsoever in Missouri. The question of the validity of the lease for the purposes of this case, therefore, has reference only to its validity at law. This was not disputed by the trial court in either of its opinions, and we assume that it will pass unquestioned on the present argument.

The claim that this lease was invalid *ab initio* is and must be based exclusively upon the judgment in the equity case; no other evidence of its invalidity was offered. The contention is, that the judgment in the equity case conclusively establishes facts which deprive the lease of any legal effect. That makes it of importance to ascertain just what was determined by that adjudication.

In the original opinion of the trial court, that is, the opinion delivered at the time of the rendition of judgment, the learned trial judge holds that the rendition "was finally adjudged to be void *ab initio* on the ground of fraud." (Printed record, pages 53, 54.) But in the opinion on the motion for a new trial it is held that the judgment in the equity case conclusively established the legal incapacity of Mr. Farnsworth to contract, and the invalidity of the lease as a consequence thereof. The ground of the annulment of the lease is material, because, as we shall see, a finding or judgment that the lease was procured by fraud in the ordinary acceptance of the term, and in the meaning in which it was used by the trial judge, does not establish the invalidity of the lease at law.

The holding of the learned judge of the trial court, which was expressed in overruling our motion for a

new trial, is based entirely upon the nature of the al legations of the petition in the equity case, which were as follows (printed record, page 57): "That said Farnsworth at the time of the execution of said agreement (meaning the Kempinsky lease) was not capable of entering into said contract or any contract and was incapable of transacting his ordinary business or managing his property by reason of weakness and imbecility of mind produced by disease and old age, and that defendant fraudulently took advantage of the imbecility and helpless condition of said Farnsworth and induced and procured him to execute said lease." It is claimed that these allegations amount to a charge of total incapacity to contract and to nothing else, and that the judgment for the plaintiff on these pleadings therefore amounted to a finding of such incapacity.

The thought will readily suggest itself that the charge here made is rather one of mental weakness superinduced by disease and old age, and that the defendant fraudulently took advantage thereof in procuring the lease. There is, however, no need for the discussion of that matter. The sufficiency of the allegations to support a finding or adjudication of undue influence is conclusively settled by the opinion of the Supreme Court of Missouri in the equity case, as is also the fact that no finding of total incapacity to contract was made. That court said: "The only remaining question is, whether the evidence is sufficient to sustain the second averment, *in which it is in substance charged that the execution of the lease by Farnsworth was procured by the defendant, A. Kempinsky, the husband of said lessee, by fraud*, in terms sufficiently specific to authorize this court, after judg-

ment without any objection having been made in the trial court at any time to the petition, to consider any legitimate testimony in the record tending to show *that its execution was procured by fraud, imposition, or undue influence;* and in determining the question whether or not it was so obtained, it may be conceded in the start that neither old age, disease, mental weakness, inadequacy of consideration, or confidential relations are *per se* independent and substantive grounds upon which courts of equity will interfere to relieve a party from a contract voluntarily entered into for a valuable consideration, nor will the mere existence of any one or all of these afford sufficient cause for avoiding such contract; they are only important factors to be considered in determining in any given case whether a fraud has been perpetrated,"

The court then proceeds to consider the case upon the theory here pointed out. First of all it undertakes to define what constitutes sufficient evidence of fraud, in which term it very properly includes undue influence, and thereon it considers the evidence with reference to the definition thus given and finds it sufficient to establish the charge. Its reasoning is that the consideration for the lease was grossly inadequate, and that the circumstances attending its execution and the proof in relation to the condition of Mr. Farnsworth did not rebut the presumption of fraud which arose from that inadequacy and perhaps from confidential relations between Mr. Farnsworth and Mr. Kempinsky. Its line of argument is indicated by the following remarks which are made by it in thus defining the fraud under consideration, and which furnish the basis of the

conclusions reached by it: "And fraud will be inferred in a contract made with a person of weak mind not amounting to imbecility or unsoundness when the consideration is grossly inadequate, unless it appear that such weak-minded person had an intelligent comprehension of the disadvantageous nature of the contract to himself, and purposed the benefit to be obtained under it by the other party, or upon some reasonable hypothesis founded upon the facts in the case other than fraud, imposition or undue influence, such contract can be reasonably accounted for. In the application of these well-known principles to the case in hand the first inquiry is, was the consideration grossly inadequate?" The conclusion of the court is that the lease "is the product of fraud and ought to be canceled."

However, if there were doubt as to the facts found by this opinion, that doubt would be resolved against the plaintiff. It is for him to show an actual finding of the utter incapacity of Mr. Farnsworth to contract, in order to render the judgment *res adjudicata* upon that subject.

The inquiry then remains whether the fraud or undue influence which was found in that case, and is therefore established by it, was sufficient to render Mrs. Kempinsky's lease invalid at law. We submit that it was not and that the law to that effect is clearly settled by the following authorities.

Burrows *v.* Alter, 7 Mo. 424;
Trueman *v.* Lore, 14 Ohio St. 144;
Windette *v.* Hurlbut, 115 Ill. 403;
Eschevick *v.* Traver, 65 Ill. 379;

Hartshorn *v.* Day, 19 How. (60 U. S.) 211;
Israel *v.* Jackson, 93 Ind. 543;
Ferguson *v.* Coleman, 5 Heisk. (Tenn.) 378;
Bigelow on Fraud, Vol. 1, pp. 47, 48, 54, 55
Malone on Real Property Trials, pp. 193, 194.
Note to Am. Dec., page 748, and authorities there cited.

III.

The only remaining ground upon which it can be contended that the trial court was correct in its judgment is, that the decree of the Circuit Court of Audrain county in the equity case was operative and enforcible during the pendency of the appeal therefrom, notwithstanding that a *supersedeas* bond had been given.

It behooves us to say, at the outset of the discussion of this point, that it is perfectly clear that the bond given operated as a *supersedeas* with respect to that decree and stayed the execution or performance of that decree. *State ex rel. Laclede Bank v. Lewis*, 76 Mo. 370.

We wish also to add that upon this appeal it was the function of the Supreme Court of Missouri to determine both the facts and the law of the case and to render whatever judgment it saw fit, so that the appeal brought the entire case before it for decision, with power not merely to affirm or reverse the judgment, but also to render such decree of its own as it might deem proper.

Benne *v.* Schnecks, 100 Mo. 250;
McElroy *v.* Maxwell, 101 Mo. 294;
Mellier *v.* Bartlett, 106 Mo. 381;
Rev. Stat. of Mo., 1879, Sec. 3776.

Recurring to the facts appearing in the present action, we also take occasion to again observe that the appeal in the equity case was pending, with *supersedeas* bond, not only at the time of the termination of Summers' lease and of the commencement of this action, but also during the entire occupancy of the land sued for by the defendant.

Now, we take it to be entirely clear that the defendant cannot be shown to have been guilty of an unlawful detainer during that period, and be mulcted in double damages therefor, by facts occurring subsequently. There could not have been an unlawful detainer during his occupancy of the land without a corresponding right on the part of the plaintiff to then enforce it.

This cause must, therefore, be determined precisely as it would have been if the trial had occurred during the pendency of the appeal. Both the rights of the plaintiff and the liabilities or obligations of the defendant relate to the time of the institution of this suit. The defendant could not then foretell what the judgment of the Supreme Court of Missouri would be. He could not then have kept Mrs. Kempinsky out of possession on the ground that the Supreme Court would thereafter decide the cause against her; and, if sued by her, he could not have made any such claim the basis of a defense. He certainly was entitled to voluntarily recognize her rights to the same extent to which the law would, at the time, have enforced such recognition by suit.

Indeed this action is nothing more nor less than a suit for the enforcement of the decree in the equity case; and the enforcement of a judgment by collateral or supplemental suit is as much stayed by a *supersedeas* bond as when the enforcement is sought by means of direct process. There is no practical difference and no distinction in principle between these two methods of enforcement. Were it otherwise, the *supersedeas* bond would have no real effect; for while execution upon the superseded judgment might be stayed pending the appeal, the plaintiff could still bring suit upon the judgment, and procure a second judgment against which there could be no defense, and have his remedy upon it.

The foregoing views are amply sustained by the following authorities:

Day *v.* De Jonge, 66 Mich. 550;
Cohn *v.* Lehman, 93 Mo. 574;
Thomas *v.* Thomas, 73 Ia. 657;
Stone *v.* Spillman, 16 Tex. 432;
Flagg *v.* Walker, 113 U. S. 659;
Sharon *v.* Hill, 26 Fed. Rep. 337;
Ketchum *v.* Thatcher, 12 Mo. App. 185;
Freeman on Judgments, (4th ed.) Sec. 328.

"The statute would lose all its real force if a decree could be treated after appeal as if no appeal had been taken. Its language is too plain for argument. While an appeal is pending on the merits, the case stands for rehearing in this court and remains as if no final decision had been made. This court can make its own decree, if it finds it desirable, or it may adopt or

modify the decree below. Whether affirmed or not affirmed, the whole case stands open until the appeal is disposed of. When it is decided, the parties are in the same legal position, if living and not bankrupt, or otherwise divested of their estate, as if the hearing was original. Whatever change may occur during the appeal must arise from something else than the original decree." *Day v. De Jonge, supra.*

Such, substantially, is also the effect of *Cohn v. Lehman, supra*, wherein the Supreme Court of Missouri, held that an action could not be maintained upon an injunction bond after the dismissal of the bill by the trial court, and while an appeal from the order of dismissal, operating as a supersedeas, was pending. The court said: "If, therefore, a valid appeal has been taken to the Supreme Court of the United States in said equity suit, and such appeal was pending in said court at the time this suit was instituted, plaintiff had no cause of action on the bond."

The following remarks made by this court in *Flagg v. Walker, supra*, as the basis of a ruling therein, are also in point: "The appellants, while they were litigating their rights with Walker in this court, having given an appeal bond which superseded the decree of the Circuit Court, was not required to make payment."

In short, the following extract from the opinion of the St. Louis Court of Appeals in *Ketchum v. Thatcher, supra*, succinctly states the law applicable to this branch of the case: "A general view of all these adjudications—and we find none conflicting with them—compels the conclusion in our minds, that, when a judgment is appealed from, with supersedeas or stay of execution,

it must, until the appeal shall be determined, be denied recognition for any practical efficacy whatever in a collateral proceeding."

Moreover, the decree of the Circuit Court of Audrain county was two-fold in its nature. It annulled the lease to Mrs. Kempinsky and gave judgment in her favor for the return of the $150 paid by her to Mr. Farnsworth for that lease. Performance of the latter part of this decree must be deemed a condition precedent to the right to enforce or invoke the other part; but no compliance therewith during the pendency of the appeal was shown or took place.

It follows that the decree of cancellation rendered by the Circuit Court of Audrain county is neither conclusive nor effective for the purposes of this action, and that for those purposes the lease to Mrs. Kempinsky must be considered valid.

IV.

If we are correct in our foregoing contention, it appears both that the trial court erred in overruling our objections to the admissibility of the transcript of the proceedings in the equity case, and that the evidence failed altogether to support the plaintiff's cause of action, or to warrant any recovery herein. But the evidence also fails to establish a case in another respect. The mere fact that the defendant held over after the expiration of his term does not necessarily warrant a recovery. The statutes of Missouri do not afford the remedy invoked in this case for every such holding

over; they apply only where the holding over is willful, and it is only willful when it is contumacious.

The statute in question reads as follows: "When any person shall willfully and without force hold over any lands, tenements or other possessions after the termination of the time for which they were demised or let to him, or the person under whom he claims * * * * such person shall be deemed guilty of an unlawful detainer." (Revised Statutes of Missouri, 1889, Sec. 5089; R. S. 1879, Sec. 2420.)

In order to be willful within the meaning of the statute, the holding over must be contumacious; a holding over by the tenant in good faith, and in the belief that he has the right to do so, does not subject him to the penalties of the statute.

Wright *v.* Smith, 5 Esp. 203, 215;
Swinfen *v.* Bacon, 6 Hurl. and Norm. 845, 847.
Woodfall on Landl. & Ten. (Amer. Notes by Webster), Vol. 2, star pp. 745, 746.

Said the court, per Cockburn, C. J., in the latter case: "We are all of opinion that the judgment of the court below must be affirmed. Ever since the case of Wright *v.* Smith, 5. Esp. 203, 215, decided more than a half century ago, the interpretation put upon the 4 Geo. 2 c. 28, has been that when a person holds over not contumaciously as against the person entitled to the possession, but under the *bona fide* belief that he has a right to do so, the statute does not apply. I think it would be very mischievous as well as contrary to the true construction of the act, if we were to hold otherwise, for

I am strongly of opinion that, 'willfully' holding over applies only when a tenant holds over in the absence of a *bona fide* belief that he is justified in so doing. * * * It has long been held that the statute applies only to the case of a tenant who holds over, though he is conscious that he has no right of possession."

The defendant requested, but the trial court refused to give a declaration of law in accordance with these authorities. Moreover, if these authorities correctly express the law, we think that they in themselves preclude the right of recovery on the part of the plaintiff, for the evidence, in our judgment, necessarily leads to the conclusion that the defendant took the lease from Mrs. Kempinsky, and paid the rent under it before any claim was made by the plaintiff, in consequence of and reliance upon the remarks of Mr. Hughlett referred to in our foregoing statement; and whether those remarks were only expressions of opinion, as the trial court held, is immaterial in this connection. Indeed, Mr. Hughlett's testimony itself tends to show that he encouraged the defendant to take the lease from Mrs. Kempinsky; for he himself testifies (printed record, page 47): "I also told him (defendant) that if he leased from Mrs. Kempinsky I did not think, considering his relations with Kempinsky, that Kempinsky would see him suffer."

We therefore submit that for this reason, as well as for those hereinbefore expressed, the judgment herein should be reversed.

Respectfully submitted,

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DAVID GOLDSMITH,
Attorneys for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

DAVID LEHNEN, PLAINTIFF IN ERROR,
vs.
NEWTON DICKSON, DEFENDANT IN ERROR. } No. 125.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, POINTS AND AUTHORITIES, AND BRIEF FOR DEFENDANT IN ERROR.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

DAVID LEHNEN, Plaintiff in Error,
vs.
NEWTON DICKSON, Defendant in Error.
No. 125.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT OF THE DEFENDANT IN ERROR.

This was an action of unlawful detainer for the recovery of the possession of the following described land situate in Montgomery county, Missouri, to wit.: The southwest fourth of the northwest quarter, the north half of the southeast quarter, the south half of the northeast quarter, the northeast fourth of the southwest quarter, and the southeast

quarter of the northwest quarter, the northwest fourth of the northeast quarter, and north half of the northwest quarter of section nine (9), township fifty (50) of range No. six (6) west; also the south half of the northeast quarter and the north half of the southeast quarter, and the north half of the northeast quarter of section number eight (8) in township No. 50 of range No. six (6) west, containing eight hundred acres (800).

The complaint was filed by Newton Dickson as plaintiff under the provisions of the Missouri statutes on the 6th day of February, 1886, before Nelson Fike, a justice of the peace for the county of Montgomery, State of Missouri; there was a mistrial of the case on the 24th of February, 1886, the jury having failed to agree.

Application was thereupon made by the complainant for a writ of certiorari from the Circuit Court of Montgomery county, directed to the said justice of the peace, Nelson Fike, for the removal of said cause to the Circuit Court, under the provisions of the Missouri Statutes: and thereupon on the 8th day of March, 1886, a writ of certiorari was issued, directed to said justice, who thereupon certified the case to the Circuit Court of Montgomery county with a full and complete transcript of all the entries made in his docket touching said cause, and all the papers filed with him in said cause.

And afterwards at the regular April term of said Circuit Court, for the year 1886, the defendant filed his petition for the removal of said cause to the Circuit Court of the United States for the Eastern District of Missouri, which said petition was granted, and on the 3d day of May, 1886, an order was made by the Circuit Court of Montgomery County for the removal of said cause to the Circuit Court of the United States for the Eastern District of Missouri.

The case was by consent submitted to the court without

the intervention of a jury, and on the 30th day of January, 1889, the court rendered judgment in favor of plaintiff, for restitution of the premises found to have been unlawfully detained and for damages in the sum of five thousand nine hundred and forty dollars ($5,940), and also that the plaintiff recover from defendant the sum of two hundred and twenty dollars per month ($220) for rents and profits from the 30th day of January, 1889, until restitution be made together with costs.

A motion was made by the defendant for a new trial, which was overruled, and thereupon the case was brought to this court by writ of error.

This suit was instituted under the provisions of sections 2420 and 2423 of the revised statutes of Missouri for 1879, Vol. 1, p. 407; being the same with the present statute on that subject (R. C. of 1889, sections 5089–5092).

Upon the trial of the cause it appeared that Newton Dickson, the plaintiff, was the husband of Barbara Ann Dickson at the time of the institution of the suit.

That on the 24th of September, 1877, Edwin H. Farnsworth, who was then the owner of the premises in controversy, made a written lease of said premises to one Thomas R. Summers, for a term of eight years commencing on the 1st day of January, A. D. 1878, and ending on the first day of January, 1886, the premises not to be underlet without the written consent of the lessor — which said lease was duly executed and recorded in the recorder's office of Montgomery county, Mo.

On the 13th of December, 1878, the said lease was assigned to one Godfrey Lehnen, and on the 8th day of April, 1879, E. H. Farnsworth the lessor approved the assignment.

On the 13th day of July, 1876, Edwin H. Farnsworth made his will, by which he bequeathed to his widow a small amount of money, stating that she would be entitled to her

dower in his estate, and all the balance of his estate he devised to his only child, Barbara Ann Dickson, wife of Newton Dickson, and in the event of the death of Barbara Ann Dickson before the death of the testator, he devised the property to the child or children of the body of said Barbara Ann. Marcus A. Wolf was appointed his executor. Said will was duly probated on the 1st day of May, 1879, Edwin H. Farnsworth, the testator, having died on the 27th day of April, 1879.

Newton Dickson was married to Barbara Ann Farnsworth in May, 1862, and she was alive at the institution of this suit.

On the 20th of September, 1880, Josephine Farnsworth, the widow of Edwin H. Farnsworth, deceased, made a quit claim deed to Barbara Ann Dickson by which she conveyed to her all her right, title, interest and estate in the property in controversy, and other property mentioned in said deed, which deed was duly acknowledged and recorded in Montgomery county on the 15th of October, 1880, and died several years before the trial of this cause.

It further appears from the evidence that David Lehnen, the defendant below, took possession of the premises under the Summers' lease, which had been assigned to his father, Godfrey Lehnen, and with the consent of his father, and remained in possession after the expiration of the lease and until the first of March, 1887.

On the 23rd of January, 1886— Newton Dickson, plaintiff below, caused notice to be served on David Lehnen, to the effect that he, Dickson, had the legal right to the possession of the premises, describing them, and demanding that he deliver up to him the possession thereof on or before the 30th day of January, 1886, now wrongfully in the possession of him, the said Lehnen.

On the 6th of February, 1886, the complaint was filed

before the justice of the peace as above stated. Testimony was produced to show the rental value of the land.

Here the plaintiff, Dickson, rested his case.

The defendant, Lehnen, by way of defense offered in evidence a lease purporting to have been executed by Edwin H. Farnsworth to Sarah A. Kempinski for the premises in controversy dated April 7th, 1879, containing a clause authorizing the lessee to sublet the premises, which was objected to by plaintiff on the ground that it was procured by fraud and otherwise constituted no defense. The court permitted the lease to be read for the present, subject to objections, stating that the objections would be subsequently passed upon.

Defendant Lehnen then read in evidence a lease dated October 15, 1885, from S. A. Kempinski to Godfrey Lehnen and David Lehnen, subletting the said premises for a term of one year commencing on the first day of January, A. D. 1886, and terminating on the first day of March, 1887—for the sum of fourteen hundred and fifty dollars ($1,450), for which a note was to be given by the lessees for that amount, payable April 6, 1866, and bearing eight per cent. interest from maturity.

Lehnen testified that he went into possession under this lease on the first day of January, 1866. He further testified that when he was negotiating with Mr. A. Kempinski, the husband of Mrs. S. A. Kempinski, he went to Mr. Hughlett, whom he understood to be the agent for Mr. Dickson, and told him, "I was thinking about leasing the land from Mrs. Kempinski, and asked him if it was all right and he told me he thought it was all right." He said on cross-examination that when he talked with Mr. Hughlett he heard there was trouble about the lease from Mr. Farnsworth to Mrs. Kempinski, and that they were going to try to set aside the lease — that he had not then taken the

lease. He further said that he knew of the decision setting aside the lease as soon as it was made, and that he was a witness at the trial of the case, and that he knew that the lease was attacked on the ground that "Farnsworth did not have good sense — that he was weak-minded," and that Mr. Hughlett once told him before the rent was paid not to pay the rent to Mr. Kempinski, unless "I took a bond of indemnity," and that Hughlett told him Mr. Kempinski had given an appeal bond and that her lease would be good; that when he paid the rent money, he took a receipt from Mrs. Kempinski and her husband, stating that if anything happened they would stand good for it.

A. Kempinski testifies that he gave Lehnen an obligation to refund whatever he would have to pay if he got into a difficulty by retaining the land.

In rebuttal plaintiff offered in evidence a notice dated December 23d, 1885, directed to Mrs. S. A. Kempinski and A. Kempinski, her husband, and signed by Newton Dickson and Barbara Dickson—to the effect that they were the owners of the land in controversy—and that they declined and refused to surrender to them, or to any person or persons claiming under them, the possession of the premises referred to, under a pretended lease of the same from E. H. Farnsworth to Mrs. S. A. Kempinski, dated April 7th, 1879, and that any possession taken under said pretended lease will be against their will and consent — which said notice was served on Mrs. S. A. Kempinski and A. Kempinski, her husband, December 24th, A. D. 1885.

Plaintiff then read in evidence the proceedings of a suit brought to the April term, 1884, of the Montgomery Circuit Court, by Barbara Dickson and Newton Dickson, her husband, against Sarah A. Kempinski and A. Kempinski, her husband, which was taken by defendants by change of venue to Audrain county, Missouri, and which shows that on the

8th day of June, 1885, the Circuit Court of Audrain county, Missouri, rendered a judgment and decree, adjudging that the lease referred to be set aside, cancelled and held for naught. From which judgment an appeal was taken to the Supreme Court of Missouri by the Kempinskis and at the October term, 1888, of the Supreme Court of Missouri a judgment was rendered by said court affirming the judgment of the court below and declaring the lease cancelled on the ground that it was procured by fraud practiced upon a man whose mind was "plunged into almost utter oblivion."

POINTS AND AUTHORITIES.

This is a proceeding arising under the statutes of Missouri, of a purely local character, and questions arising in the case must be decided in conformity with the laws of the State as interpreted by its highest courts.

The suit was brought under the following section of the statutes of Missouri, to wit:

"§ 2420. When any person shall willfully and without force, hold over any lands, tenements or other possessions, after the termination of the time for which they were demised or let to him, or the persons under whom he claims, or when any person wrongfully and without force, by disseizin, shall obtain and continue in possession of any lands, tenements or other possessions, and after demand made in writing, for the delivery of the possession thereof, by the person having the legal right to such possessions, his agent or attorney, shall refuse or neglect to quit such possession, such person shall be guilty of unlawful detainer."

I.

It was maintained by the plaintiff in error in the trial court, that the record of the decrees of the Circuit and Supreme Court of Missouri in annulling the Kempinski lease is not admissible in evidence, because of the provisions of Sec. 2443, of the statute, which declares:

"Sec. 2443). The merits of the title, shall in nowise be inquired into, on any complaint which shall be exhibited by virtue of the provisions of this chapter."

But if that provision of the statute is applicable in this case, it would necessarily exclude the lease offered by defendant, upon which he wholly relies to justify his holding over.

But it has often been held in Missouri that a tenant when sued for an unlawful detainer may show that since the date of the lease, the lessor has parted with his reversion, either by voluntary conveyance, or by sale under execution and that he has attorned to the vendee or purchaser under execution.

Kingman *v.* Abington, 53 Mo., p. 46;
Pentz *v.* Kaester, 41 Mo. 447;
Higgins *v.* Turner, 61 Mo. 250;
Gorman *v.* Sinclair, 52 Mo. 327.

From the earliest period it has been held that under the plea of *non est factum*, it may be shown that a deed was void *ab initio*, or that it was obtained by fraud, and when a deed is offered in evidence at any stage of a proceeding, it may be shown that it was no deed at all, because it was void *ab initio*.

II.

It was next insisted by the defendant below, that the lease to Kempinski must be held valid when the suit was commenced in this case, because although the Circuit Court had adjudged the lease void, yet an appeal had been taken to the Supreme Court, and a supersedeas bond given.

But the appeal did not operate to vacate the decree, it only suspended its execution, and besides, upon the final decree of the Supreme Court the lease was held to have been void *ab initio*, it never had any legal existence for any purpose.

III.

It was further contended by the defendant below on motion for a new trial, that the judgment of Missouri courts whereby the lease in question was cancelled was rendered upon the ground that said lease was procured by *undue influence*, and that therefore the lease was not void but voidable.

The decree of the court could not well be broader than the petition or cause of action, but the petition amongst other things charges: "That the said Farnsworth, at the time of the execution of said agreement, was not capable of entering into said contract, or any contract, and was incapable of transacting his ordinary business or managing his property by reason of weakness and imbecility of mind produced by disease and old age, and that defendant, A. Kempinski, fraudulently took advantage of the imbecility and helpless mental condition of said Farnsworth, and induced and procured him to execute the said lease to his (the said Kempinski's) wife.

According to this averment the said Farnsworth was in the same condition as an idiot or a lunatic — he was not *compos mentis*, and the evidence showed to the court that this was true, and that under those circumstances Kempinski procured the lease to be made, and adjudged it void.

It is the product of fraud (says the Supreme Court of Missouri) and ought to be cancelled.

IV.

There can be no question that the plaintiff, Dickson, and his wife as the direct representatives of Farnsworth, at

the termination of the first lease were constructively in possession of the premises in controversy, because they held the legal title undisputed, unless the adverse party had entered by their consent as in case of a voluntary sale of the property to another — or by sale *in invitum* as in case of sale under execution.

But the Supreme Court of Missouri has held that although all the lessor's interest in the demised premises has been sold under execution, so that he had neither title nor right of possession, yet that he might maintain an action of unlawful detainer against the holder of the title, who had bought under execution, and had entered after the lessor's tenant had left the demised premises vacant at the end of the term.

See May *v.* Luckett, 48 Mo. 472, in which it is held that the landlord when the tenant leaves either at the end of the term or by surrender of the lease, must be considered as possessor of the premises, though not personally present.

And this is not at all in conflict with a former decision of the same court in the case of L' Hussier *v.* Zallee, 24 Mo., p. 14.

In the case before the court, however, there was no sale under execution, nor any assignment of the premises by voluntary sale, nor any lease of the premises to the defendant or his assignor, because the pretended lease was declared void *ab initio*.

And even if it had not been void *ab initio*, yet the pretended lease to Kempinski, the lessor of defendant, was for a term to commence six years after its date; it was a mere executory contract and created only an *interesse termini*, and therefore could not give the lessee even constructive possession.

See Austin *v.* Huntsville Coal and Mining Company, 72 Mo., p. 541, and authorities cited.

V.

Reliance is placed by the defendant upon the fact that he went to Hughlett, the attorney and agent of plaintiff, and asked him whether Kempinsky had the right to give the lease to defendant, and that Hughlett said he had the right.

Hughlett denies this and says that the matter discussed was whether the appeal bond in the suit to set aside the lease operated as a supersedeas so as to permit Kempinsky to make the lease: that he was asked the question, and he answered the question that it did not so operate. See pages 46 and 47 of transcript.

But it matters not which version is correct, according to the showing of the defendant's witnesses, it was a mere opinion that did not bind the plaintiff. He did not make any lease or agreement to make a lease, nor did he give any consent that Kempinsky should make a lease to defendant, nor was he authorized to do so. Hughlett was attorney for defendant, not a general agent, and he was only agent so far as he was attorney. Defendant had given him no authority to rent the premises, or to authorize Kempinsky to rent them. The evidence is offered for the purpose of being construed into an admission on the part of plaintiff that Kempinsky had the right to put defendant into possession: Hughlett had no right to make such an admission, if indeed he ever made it, which we deny.

But if the plaintiff himself had made such an admission in the fall, it appears that in December following he notified Kempinsky not to take possession of the property — the testimony of defendant and Kempinsky on this point, if all of it were true, amounts to nothing in this case.

VI.

Defendant in his brief says that if the plaintiff's right of recovery depends on an inquiry into the merits of the

title, he cannot succeed; this we admit. Then the defendant says:

"The case established by the plaintiff at the outset required no such inquiry, the evidence on his behalf merely showed the first lease to Mrs. Kempinsky, and the holding over after its termination by the defendant, but these facts do not lead to the real issue; they are not denied."

"Then comes the defendant's side of the case; he admits the plaintiff's evidence, but procures the second lease; he is in possession under it."

The question may be asked just here, "How do you show that he is in possession under it?" By producing the lease, of course, the second lease. Is not the production of the lease as much an inquiry into the merits of the title as the attack made by the plaintiff upon the validity of the lease? The defendant cannot move an inch in his claim under Kempinsky without producing this fraudulent lease to Kempinsky: and yet he claims that we cannot attack it for fraud, or in other words cannot show that no such lease was ever made, for a fraudulent lease is no lease; because this would be an inquiry into the merits of the title.

The defendant seems to think that this rule only applies to one party.

But really the producing of the lease is not an inquiry into the merits of the title: it is simply evidence as proof of right under a derivative title, that is that Kempinsky has derived his right to possession from the landlord who made the first lease; it was introduced and could only have been introduced for that purpose under section 2457 of the statute, which says:

"Evidence for proof of rights under derivative titles, provided for by this chapter shall be admissible in actions instituted under this chapter."

1 R. S. Mo. 1889, p. 412.

And surely if it can be introduced it may be attacked.

When therefore the defendant admits that we have shown a holding over by the defendant after the expiration of the first lease, he admits away his case, that is all we claim. When the plaintiff has shown that much he has made out his whole claim.

But then the defendant comes in and offers the second lease to Kempinsky, and says that defendant is in possession under this lease; to this we answer:

(a) That no such lease was in existence because it was procured by fraud, and therefore had no legal existence, as shown by the judgment of the highest court in the State.

If it was ever fraudulent it was fraudulent *ab initio:* fraudulent when it was made and therefore no one could ever have a valid claim under it. The plaintiff claims that it was valid when possession was undertaken to be given under it to the defendant, but if void when made as has been held by the courts how could it ever be valid for any purpose? It is certainly a strange proposition to hold otherwise.

(b) But if this second lease to Kempinsky had been a fair and valid lease, it never gave Kempinsky possession of the premises, and if it did not give him possession he could not by virtue of that lease give the defendant possession.

So far as the question of possession is concerned a lease is simply an executory contract: it does not put the lessee in possession either actually or constructively; to obtain possession under the lease the landlord must put the lessee in possession. A lease does not like a deed take the place of livery of seizin. If possession is not delivered to lessee by the landlord the only remedy which the lessee has was either to sue for the possession in ejectment or sue for the breach of the contract.

If the second lease — the lease to Kempinsky, had been

a valid one it at most amounts only to an executory contract made by Farnsworth with Kempinsky by which he agrees to give him possession at a certain time for a certain time. What is a lease without possession?

"A tenant for years is not said to be seized of the lands, the possession not being given him by the ceremony of livery of seizin, nor does the mere delivery of a lease for years vest any estate in the lessee, but only gives him a right of entry in the land. When he has actually entered, an estate becomes vested in him not properly of the land but of the term of years, the seizin of the freehold still remaining in the lessor; until the lessee shall have entered upon the leased premises, he acquires no interest in the same. Before entry under the lease as a demise at common law the lessee has only an executory interest or *interessee termini* and no possession."

Austin *v.* Huntsville Coal Co., 72 Mo. 541.
4 Kent's Commentaries, 11th edition, page 442.

And that is the difference between the conveyance of the freehold and a lease to commence at a future time. A conveyance is a substitute for the ceremony of livery of seizin, and puts the grantee into constructive possession from its delivery,— it is an executed contract, whereas the lease is only an executory contract for possession at a future time.

In the case of Micham *v.* Walsh, 6 Mo., page 347, it is said "that the instrument given in evidence purporting to be a lease from plaintiff to the defendant did not by itself vest any possession in the defendant, but at most could only give a right to be made available according to law, that there was no evidence before the jury of any delivery of possession of the premises having been made by the plaintiff to the defendant, but on the contrary the evidence went

to show that the plaintiff refused to give such possession to defendant." If, therefore, Kempinsky, under this lease had gone into possession without the consent of the lessor, his possession would have been wrongful, and so it would have been wrongful to put any one else in possession, and he could not make it lawful by attorning to another who had no right to the possession.

If this be the law it matters not whether the lease was fraudulent or not. The defendant had no possession under the lease because neither he nor Kempinsky had ever been put in possession by authority of the lessor, and all the authorities on the subject of an appeal bond operating as a supersedeas have no relevancy to the case.

The defendant makes a point upon the word "willfully" in section 2420 of the statute.

The statute says "when any person shall willfully and without force, etc., etc., etc., after the termination of the time for which they were devised." This provision of the statute is explained by Sec. 2433, which says, "but the complainant shall not be compelled to make further proof of the forcible entry or detainer than that he was lawfully possessed of the premises and that the defendant unlawfully detained the same."

To prove that the premises were unlawfully detained where the suit is for unlawful detainer is all that is required to be proven in order to entitle the plaintiff to recover; in other words, an unlawful detainer is in law a willful detainer and it is not necessary to prove separately a willful detainer.

Besides, when a demand was made in writing as was required by the statute and he holds over after the demand is made, to say this is not a willful holding over is absurd.

But there is no provision in the English statute referred to such as is contained in section 2433 of our statute. The

English statute is simply a provision for the recovery of double rents and in the authorities referred to by defendant it is held that "in order to maintain the action for double value, the fact must be established that the tenant held over willfully and not by accident or mistake as to his rights." See Wood on Landlord and Tenant, page 965. But under our law to maintain the action for unlawful detainer the complainant shall not be compelled to make further proof that he was lawfully possessed of the premises and that defendant unlawfully detained the same. The cases are different and the law is different.

We submit the case with entire confidence that the law and the facts authorize a judgment for the defendant in error.

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